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ABRIDGMENT OF THE LAW

BY MATTHEW HARRIS

OF THE SUPREME COURT

LARGE ADDITIONS AND CORRECTIONS

BY JOHN HENRY DEWEY

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A NEW
ABRIDGMENT OF THE LAW.

BY MATTHEW BACON,
OF THE MIDDLE TEMPLE, ESQ.

WITH
LARGE ADDITIONS AND CORRECTIONS,
BY SIR HENRY GWYLLIM,
AND
CHARLES EDWARD DODD, ESQ.

AND WITH
THE NOTES AND REFERENCES MADE TO THE EDITION PUBLISHED
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BY JOHN BOUVIER.

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PREROGATIVE.

PREROGATIVE is a word of large extent, including all the rights and privileges which by (a) law the king hath, as head and chief of the commonwealth, and as intrusted with the execution of the laws.

Vide Stamf. Prero. c. 1; Co. Lit. 90. [By the word prerogative we usually understand that special pre-eminence which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity. It signifies, (in its etymology from *præ* and *rogo*,) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the crown could be held in common with any subject, it would cease to be prerogative any longer. And therefore Finch lays it down as a maxim, (Finch's L. 85,) that the prerogative is that law in case of the king, which is law in no case of the subject. 1 Bl. Com. 239.] (a) That the king's prerogative is part of the law of England, and comprehended within the same. 2 Inst. 496.

The nature of our constitution is that of a limited monarchy, in which the legislative power is lodged in the king, lords, and commons; but the king is intrusted with the executive part, and from him all justice is said to flow: hence he is styled the head of the commonwealth, supreme governor, *parens patriæ*, &c., but still he is to make the law of the land the rule of his government; that being the measure as well of his power, as of the subjects' obedience: for as the law asserts, maintains, and provides for the safety of the king's royal person, crown, and dignity, and all his just rights, revenues, powers, and prerogatives; so it likewise declares and asserts the rights and liberties of the subject.

And. 153; Co. Lit. 19, 73; 4 Co. 124.—That he is to defend his subjects. 7 Co. 4.—That he cannot change the law. 5 Co. 55; 2 Inst. 36; 11 Co. 70.—Finch's L. 81, 82, 83, speaks highly of it, as a matter divine: the king, says he, carries God's stamp, and has the shadow of God's excellencies given him: the power of God is joined with excellency; for to do wrong is not omnipotency, but weakness; so it is with the king, he can do no wrong, &c. As to which my Lord C. J. Hale saith, it is regularly true, that the law presumes the king will do no wrong, neither indeed can he do any wrong; and therefore, if the king command an unlawful act to be done, the offence of the instrument is not thereby indemnified: For though the king is not under the coercive power of the law, yet, in many cases, his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful; and so renders the instrument of the execution thereof obnoxious to the punishment of the law; yet in time of peace, if two men combat together at barriers, or for trial of skill, if one kill the other, it is homicide; but if it be by the command of the king, it is said it is no felony. Hal. Hist. P. C. 43, 44. ¶ This means if the combat or tournament were by the command or license of the king, then the death is no felony; for the king's license made the combat lawful, which, without it, was an unlawful act. Vide 3 Inst. 56, 160.¶

Hence it hath been established as a rule, that all prerogatives must be for the advantage and good of the people, otherwise they ought not to be allowed by the law. (b)

Moor, 672; Show. P. C. 75. (b) And most undoubtedly this is the great end of the king's prerogative, who is not the sovereign of the state, but the people's executive magistrate: for as to sovereignty, that resides where the constitution has placed the

legislative power, *i. e.* in king, lords, and commons, in parliament assembled; so that the king, in his political capacity, as one of the states of the realm, possesses a part, and only a part of the sovereignty, but is not sovereign, any more than a part is equal to the whole. But, as executive magistrate, he is invested with great power, pre-eminence, and many prerogatives; all intended by the constitution to be employed for the good of the people; none to their detriment; nor can any prerogative be legally so employed.

[This passage, which has been industriously foisted into the work by the last editor, abounds throughout with the most dangerous political errors. It gives a false view of the nature of our government: it represents it as almost a pure republic. From the qualifications which the kingly power is subjected to, the editor would infer the non-existence of the power itself; because the king acts with *advice* in all cases, and with *advice* and *consent* in some cases, therefore he never acts *proprio jure*. Because the law hath assigned him various counsellors to aid and advise him in the deliberative and executive parts of his government, therefore these counsellors are co-equal and co-ordinate with him.—But let us mark the several parts of this notable passage, and let us see how well they correspond with the authorities we shall hereafter cite—authorities drawn from our records and statute books, and from the writings and speeches of men eminent for their knowledge of the law and constitution of their country, and not suspected of any blind attachment to monarchy. “The king is not the sovereign of the state, but the people’s executive magistrate.”—“Sovereignty resides where the constitution has placed the legislative power, *i. e.* in king, lords, and commons, in parliament assembled; so that the king, in his political capacity, as one of the states of the realm, possesses a part, and only a part of the sovereignty, but is not sovereign, any more than a part is equal to the whole.”—In the first place this writer seems to suppose, that the sovereign power of a state consists merely in legislation; whereas the power of a state consists equally in enforcing the execution of laws when made, as in the making of them.—“But,” saith this writer, “the king is not the sovereign of the state, but the people’s executive magistrate;”—if then the king is not the sovereign of the state, but the people’s executive magistrate, the people are the sovereign of the state, for the king is *their* magistrate: but, according to this writer, the sovereignty is lodged not in the people only, but in king, lords, and commons; then, upon this writer’s own hypothesis, the people cannot be sovereign, for, to use his own words, *a part cannot be equal to the whole*; but if they are not sovereign, how can the king be the *people’s* executive magistrate? whence is their authority to commission this officer?—But so far from the king not being the sovereign of the state, it will appear from the following authorities, that the whole power of the state, both legislative and executive, subject to certain limitations and qualifications, is vested in the king alone; that he, with the advice and consent of his great council, makes laws; and, with the advice of other councils, executes those laws when made: that he is not one of the estates of the realm, as this writer supposeth him to be, but paramount those estates. Lord Coke saith, in his 4th Inst. p. 3, that the king is *caput, principium, et finis* of his court of parliament. In 22 E. 3, Hil. term, plea 25, it is laid down thus: *Et fuit dit, que le roy fait les leis par assent des peres et de la commune, et non pas les peres et la commune*.

According to Lord Hale, “Although that the English monarchy is not in all respects absolute and unlimited, but hath certain qualifications of monarchical power, especially in point of making laws, and imposing taxes upon the people; yet, certainly, since the denomination of the government is *ad plurimum*, the government is monarchical, and not aristocratical or democratical. And hence it is, that all jurisdiction in this realm, whether ecclesiastical or civil, is derived from the crown; and that the exercise thereof in the ministers or judges, to whom it is so delegated by the crown, is in right of the crown, and by virtue of a delegation from it.” Ibid. 190. And in a preceding part of this tract, Lord Hale, speaking of the deliberative and executive parts of civil government, says, “In both which, though the king under God be supreme governor and fountain, yet it is necessary for him to call in others *in partem sollicitudinis*, and, as to use their assistance in the executive part, so to have their advice and council in the deliberative part of his government.” Hale’s Jurisd. of the Lords’ House, p. 4. Again, Whitelock in his comment on the parliamentary writ, says, “The making of statutes is by the king with the assent of the lords and commons in parliament.” Vol. i. 406. And farther, the style of our acts of parliament is, *Be it enacted by the King’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in parliament assembled*. Even in money bills, when the commons have granted the king their money, they pray that he will be graciously pleased to make it a law. “We your Majesty’s most dutiful and loyal subjects, the Commons

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of Great Britain in parliament assembled, having, &c., &c., Do beseech your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent," &c. &c.

With respect to the king's not being one of the estates of the realm, read the words of Lord Hale in another part of the tract above referred to. The nobility, clergy, and commonalty are the three estates of the kingdom. The king comes in upon a higher denomination and title, namely, the head of these three estates. And therefore they that have gone about to make the king one of the three estates are mistaken, as will easily appear to any that will but read the records fully, being, viz. Rot. Parl. 9 H. 5, n. 15, the conclusion of the peace between the kings of England and France by the king's command in parliament, 2 May, 9 H. 5, read *coram tribus statibus regni*, viz. *prælati et clere, nobilibus et magnatibus, et communitate regni Angliæ*, and by them assented to. Rot. Parl. 3 & 4 E. 4, n. 53, *le roy et les trois estates*. Rot. Parl. 13 E. 4, n. 16 & 17, *domino rege et tribus statibus regni stantibus in eodem parlamento*. And in the first parliament of the usurper R. 3, who would be sure to want no formality to countenance his usurpation, Rot. Parl. 1, *titulus Regius*, there is cited an instrument allowing him to be king before his coronation was declared in the name of the three estates of this realm of England, viz., the lords spiritual and temporal, and commons. "Bee it ordained, that the tenour of the said rolle, with all the contynue of the same, presented as is abovesaid, and delivered to our beforesaid souverain lord the king, in the name and on the behalf of the sayd three estates out of parliament, now by the same three estates assembled in this present parlement, and by auctorite of the same, bee ratified, enrolled, recorded," &c. This, though done in a time of usurpation, yet sufficiently evidenceth what the three estates were.* And the objections against it, 1, that two of those estates are constituents of the lords' house, and so must outbalance the commons, which are but one of the three estates; and, 2, that the lords spiritual by this means should have a negative voice upon the lords temporal and commons, and so no law could be made without the consent of the major part of the spiritual lords and the major part of the temporal lords, as well as the most part of the commonalty; I say these objections are vain. For though it be true, that two of the three estates are constituents of the lords' house, yet they constitute but one house. And the laws and customs of the kingdom, which are the true measure of all bounds of power, have given a negative voice of either house upon the other, and of the king upon both; but have not given a negative voice of only one of the two estates constituting the lords' house unto the other, or to the commons being the third estate; *the legislative power being lodged in the king with the assent of the two houses of parliament as such*, and not with the assent of the three estates simply considered as such; *for it is the settled constitution and custom of the kingdom, that fixeth and defineth where the legislative power is lodged, not notions and fancies*. Hale's Jurisd. of the Lords' House, &c., p. 10, 11. And Lord Coke, before him, had begun his chapter on the High Court of Parliament in these words: "This court consisteth of the king's majesty, sitting there, as in his royal political capacity, and of the three estates of the realm, viz.," &c., 4 Inst. cap. 1. And after him, at the memorable æra of the revolution, in the preamble to the Bill of Rights, the Convention Parliament use these words: "Whereas the lords spiritual and temporal, and commons, assembled at Westminster, lawfully, fully, and freely representing *all the estates of the people of this realm*, did, upon, &c., present unto their majesties," &c. Stat. 1 W. & M. sess. 2, c. 2.

But the theory of our government is sketched with admirable spirit and correctness by the Attorney-general, in his address to the jury upon Hardy's trial. "The power of the state, by which I mean the power of making laws, and enforcing the execution of them when made, is vested in the king; enacting laws in the one case, that is, in his legislative character, by and with the advice and consent of the lords spiritual and temporal, and of the commons in parliament assembled, according to the law and constitutional custom of England; in the other case, executing the laws, when made, in subservience to the laws so made, and with the advice, which the law and the constitution hath assigned to him in almost every instance, in which it has called upon him to act for the benefit of the subject."—Hardy's Trial, by Gurney, p. 32. Again, in a subsequent passage, after having stated the royal duties, he goes on thus: "To that king, upon whom these duties attach, the law and constitution, for the better execution of them, have assigned various councillors, and responsible advisers: it has clothed him, under various constitutional checks and restrictions, with various attributes and

*In addition to the above authorities collected by Lord Hale, see Rot. Parl. 13 R. 2, m. 9, 11 H. 6, m. 17.

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prerogatives, as necessary for the support and maintenance of the civil liberties of the people: it ascribes to him sovereignty, imperial dignity, and perfection: and because the rule and government, as established in this kingdom, cannot exist *for a moment* without a person filling that office, and able to execute all the duties from time to time, which I have now stated, it ascribes to him also that he never ceases to exist. In foreign affairs, the delegate and representative of his people, he makes war and peace, leagues and treaties: in domestic concerns, he has prerogatives, as a constituent part of the supreme legislature: the prerogative of raising fleets and armies: he is the fountain of justice, bound to administer it to his people, because it is due to them: the great conservator of public peace, bound to maintain and vindicate it; everywhere present, that these duties may nowhere fail of being discharged: the fountain of honour, office, and privilege; the arbiter of domestic commerce, the head of the national church." Ibid. 35. And in the conclusion of this brilliant sketch, he closes the whole with these emphatical words: "Gentlemen, I hope I shall not be thought to misspend your time in stating thus much, because it appears to me, that the fact that such is the character, that such are the duties, that such are the attributes and prerogatives of the king in this country, (all existing for the protection, security and happiness of the people in an established form of government,) accounts for the just anxiety, bordering upon jealousy, with which the law watches over his person—accounts for the fact, that in every indictment, the compassing or imagining his destruction or deposition, seems to be considered as necessarily co-existing with an intention to subvert the rule and government established in the country: it is a purpose to destroy and to depose *him*, in whom the supreme power, rule, and government, under constitutional checks and limitations, is vested, and by whom, with consent and advice in some cases, and with advice in all cases, the exercise of this constitutional power is to be carried on." Ibid. 36.

With respect to the rule which is said in the text to be established, viz., "that all prerogatives must be for the advantage and good of the people, otherwise they ought not to be allowed by the law," it is neither expressed in terms sufficiently clear and precise, nor will it hold in the extent to which, as there stated, it may be carried. It is not clear from the terms whether it meant, that the prerogative or right itself shall be disallowed, if found to be injurious to the public, or only the act done by virtue and in exercise of that right or prerogative. If the former be the meaning, we may not hesitate to pronounce that there is no such rule of law; for all the prerogatives of the crown are vested in it for the protection and happiness of the people, and cannot in law be wrested from it without danger to both. If the latter be the meaning, then the rule will not hold universally and in all cases. The higher prerogatives of the crown are not to be measured by the rules of law, or to be scanned by the reason of our judges; nor are acts done by virtue of any of those prerogatives to be set aside on the ground, that they are not for the public good. For instance, the king has the prerogative of making war and peace: invested with that prerogative, he makes a treaty of peace: that treaty is found to be injurious to the country: is the treaty therefore a nullity? is there any authority in any man, or body of men in this country, to vacate it, because it is a bad treaty? The king has the prerogative of giving his *assent*, as it is called, to such bills as his subjects, legally convened, may present to him, that is, of giving them the force and sanction of a law: he withholds his assent to a bill evidently calculated to promote the interests of his people: does the bill, because it is a good bill, therefore pass into a law, though it want the royal *fiat*? or does the utility of the measure deprive the crown of its constitutional power of *rejecting*? The rule then seems to go no further than this, that in the exercise of some of the prerogatives, the royal authority is submitted to the control and direction of the courts of law, the judgment of the king is in some cases committed to his judges. In those cases it is the duty of the judges so to admeasure the royal prerogatives as that they shall in no case be exerted so as to affect the inheritance of any one, to change the course of the law, or to work individual injury. Plowd. 236, 487; Noy, 175. They will always remember the maxim of law, that the king can do no wrong: if they find that wrong has been done, the act cannot be the act of the king, and therefore ought not to be allowed.]

The rights and prerogatives of the crown are in most things as ancient as the law itself; for though the stat. 17 E. 2, st. 1, commonly called the statute *de prerogativa regis*, seems to be introductive of something new, yet for the most part it is but a sum or collection of certain prerogatives that were known law long before: as, that the king's wardship of lands *in capite* did attract the wardship of lands held of others; that the grant

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of a manor did not pass an advowson appendant, unless named; that the king had a right to escheats, wrecks, royal fishes, and many others which were ancient prerogatives of the crown.

Bendl. 117; 2 Inst. 263, 496; 10 Co. 64.

But, for the better understanding hereof, I shall consider,

- (A) When the King commences his Reign, and the Ceremony requisite therein: ||and herein of a King *de jure* and *de facto*.||
- (B) Of the King's Prerogative as universal Occupant: And herein,
1. *That he is universal Occupant and entitled to all derelict Lands.*
 2. *Of his Prerogative in Escheats.*
 3. *Of his Prerogative in Seas and Navigable Rivers.*
 4. *Of his Prerogative in Swans and Royal Fishes.*
 - [5. *Of his Prerogative in Ports and Havens.*]
 6. *Of his Prerogative in Beacons and Light-Houses.*
 7. *Of his Prerogative in Wreck.*
 8. *Of his Prerogative in relation to Coins and Mines.*
 9. *Of his Prerogative in derelict Goods; and therein, of Waifs, Strays, and Treasure Trove.*
 10. *Of his Prerogative in Fines and Forfeitures.*
- (C) Of his Prerogative over the Persons of his Subjects: And herein,
1. *Who shall be said his Subjects.*
 2. *That he is entitled to the Service and Allegiance of his subjects; and therein, of the Oaths enjoined them.*
 3. *That he may restrain his Subjects from going abroad; and therein, of the Writ de Ne exeat Regno.*
 4. *That he may command his Subjects to return Home; and therein, of awarding a Privy Seal.*
- (D) Of the King as the Fountain of Justice, and intrusted with the Execution of the Laws; And herein,
1. *That all Civil Jurisdiction flows from the King.*
 2. *Of the King's Prerogative in Ecclesiastical Matters.*
 3. *Of his Prerogative in creating Officers.*
 4. *Of his Prerogative in making War and Peace.*
 5. *Of his Prerogative in taking Care of Infants, Idiots, Lunatics, and Charitable Uses.*
 6. *Of his Prerogative in Pardoning.*
 7. *Of Dispensations and Non obstantes.*
 8. *Of his Proclamations.*
- (E) How the Rules of Law differ with respect to the King and a Private Person: And herein,
1. *Of What Things incapable, from the Dignity of his Person and Office.*
 2. *What Things enure to him in his natural, what in his political Capacity.*
 3. *Of the Difference in the Rules of Law as directing the King's Property, otherwise than that of a Subject.*
 4. *That his Rights shall be preferred to a Subject's where they happen to meet.*
 5. *Of Acts of Parliament which extend to or bind not the King.*
 6. *That no Laches can be imputed to him; and therein, of the Maxim, Nullum Tempus occurrit Regi.*
 7. *Of his Prerogative in his Suits and Proceedings in Courts of Justice.*
- (F) Of the King's Grants and Letters Patent: And herein,
1. *What Things the King may grant: And therein,*

(A) When the King commences his Reign, &c.

1. Of grants arising from his Prerogative of Power, and what are inseparably annexed to the Crown.
2. Of grants arising from his Interest.
3. How far the King must have an interest, in order to enable him to grant.
4. Grants tending to a Monopoly; and therein, of Things of a new Invention.
5. Grants of the sole Liberty of Printing.
2. *Of the Construction of the King's Grants and Letters Patent, as to their being good or void; and herein, of the King's being deceived in his Grant.*
3. *Where the King's Grantee shall partake of his Prerogative.*

(A) When the King commences his Reign, and the Ceremony requisite therein:
 || and herein of a King *de jure* and *de facto*.||

UPON the death or demise of the king, his heir is that moment invested with the kingly office and regal power, and commences his reign the same day his ancestor dies; whence it is held as a maxim, (a) that the king never dies.

7 Co. 12, in Calvin's case; 6 Co. 27; 7 Co. 30. (a) And therefore if lands are given to the king by deed enrolled, without the words *heirs or successors*; yet a fee-simple passeth, for that in judgment of law he never dies. Co. Lit. 9.

And herein we must take notice, that the rules of descent are the same with those that govern private inheritances, except only as to the rule of *possessio fratris*, which does not hold in the descent of the crown or its possessions: neither is half blood any impediment in such case; for the brother of the half blood shall be preferred to the sister, in the enjoyment of the crown, as the most capable of the two, by the advantages and prerogative of his sex.

Co. Lit. 15 b. [But these are not the only exceptions in the case of the crown to the general rules of descent: for, among the females, the crown descends by right of primogeniture to the eldest daughter only, and her issue, and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect; and therefore Queen Mary on the death of her brother succeeded to the crown alone, and not in partnership with her sister Elizabeth. 1 Bl. Com. 194.]

Therefore, if the king hath issue a son and a daughter by one *venter*, and a son by another *venter*, and purchases lands and dies, and the eldest son enters and dies without issue, the daughter shall not inherit those lands, nor any other fee-simple lands of the crown, but the younger brother shall have them together with the crown.

Co. Lit. 15 b.

As the king commences his reign from the day of the death of his ancestor, it hath been held, that compassing his death before coronation, yea before proclamation of him, is a compassing of the king's death within the statute of 25 E. 3, stat. 5, c. 2, he being king presently, and the proclamation and coronation only honourable ceremonies (b) for the further notification thereof.

3 Inst. 7; Hal. Hist. P. C. 101. (b) The late Mr. Justice Foster is, however, very far from thinking that the solemnity of a coronation is to be considered *amongus* merely as a royal ceremony, or as a bare notification of the descent of the crown, as authors of high distinction have been pleased to express themselves: He admits that it is, on the part of the nation, a public solemn recognition that the regal authority, and all the prerogatives of the crown, are vested in the person of the king, antecedent to that solemnity; but the solemnity of a coronation *with us* goeth a great deal farther; the coronation

(A) When the King commences his Reign, &c.

oath importeth, on the part of the king, a public solemn recognition of the fundamental rights of the people; and concludeth with an engagement under the highest of all sanctions, that he will maintain and defend those rights; and to the utmost of his power make the laws of the realm the rule and measure of his conduct. *Fost. Rep.* 189. See *Sid. on Gov.* 91, 92, s. 7.

Also it is held, that every king for the time being, in the actual possession (a) of the crown, is a king within the intention of the above-mentioned statute; for there is a necessity that the realm should have a king, by whom, and in whose name, the laws are to be administered; and the king in possession, being the only person who either doth or can administer those laws, must be the only person who hath a right to that obedience which is due to him who administers those laws; and since, by virtue thereof, he secures to us our lives, liberties, and properties, and all other advantages of government, he may justly claim returns of duty, allegiance, and subjection.

Hawk. P. C. c. 17, § 11. (a) As to the distinction between a king *de facto* and *de jure*, my Lord Hale says, a king *de facto*, but not *de jure*, such as were *H. 4*, *H. 5*, *H. 6*, *R. 3*, *H. 7*, being in the actual possession of the crown, is a king within this act; so that compassing his death is treason within this law; and therefore in the *4 E. 4*, 20, a person that compassed the death of *H. 6*, was attainted for that treason in the time of the rightful king; but had it been an act of hostility in assistance of the rightful heir of the crown, which afterwards obtained, this had not been treason, but *è converso*, those that assisted the usurper, though in the actual possession of the crown, have suffered as traitors, as appears by the statute of *1 E. 4*, and as was done upon the assistance of *H. 6* after his temporary readeption of the crown, in *10 E. 4*, and *39 H. 6*. *Hal. Hist. P. C.* 102, 103. ¶ But it seems that Sir R. Grey, the person alluded to as being attainted in *4 E. 4*, 20, was attainted for actual rebellion against Edward the Fourth himself, some years after he was in full possession of the crown. See Sir M. Foster's remarks on this passage, *Fost. Cr. L.* 397. ¶ [Sir M. Foster, speaking of a king *de jure et de facto*, and contending that allegiance is due by the subject to the latter as well as the former, hath these remarkable words: "He (the subject) hopeth for protection from the crown, and he payeth his allegiance to it, in the person of him whom he seeth in full and peaceable possession of it: he entereth not into the question of title, he having neither leisure, nor abilities, nor is he at liberty to enter into that question: but he seeth the fountain from whence the blessings of government, liberty, peace, and plenty flow to him, and there he payeth his allegiance." *Fost. Cr. L.* 399.]

It hath been settled, that all judicial acts done by Henry the Sixth, while he was king, and also all pardons of felony and charters of denization granted by him, were valid; but that a pardon made by Edward the Fourth before he was actually king, was void even after he came to the crown.

Hawk. P. C. c. 17, § 13, and the authorities there cited.

The right heir of the crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a king within this act; as was the case of the house of York, during the plenary possession of the crown in Henry the Fourth, Henry the Fifth, and Henry the Sixth. But if the right heir had once the possession of the crown, as king, though an usurper had afterwards gotten the possession thereof, yet the other continues his style, title, and claim thereto, and afterwards re-obtains the full possession thereof; a compassing the death of the rightful heir, during that interval, is a compassing of the king's death within this act; for he continued a king still, *quasi* in possession of his kingdom; which was the case of Edward the Fourth, in that small interval wherein Henry the Sixth re-obtained the crown; and the case of Edward the Fifth, notwithstanding the usurpation of his uncle Richard the Third.

Hal. Hist. P. C. 104.

(A) When the King commences his Reign, &c.

|| This last passage, however, is not very consistent with the statute 11 Hen. 7, c. 1, which, after reciting, "That the subjects of England are bound by the duty of their allegiance to serve their prince and sovereign lord, *for the time being*, in defence of him and his realm, against every rebellion, power, and might raised against him," &c., enacts, "That no person attending upon the king, for the time being, in his wars, shall for such service be convict or attain of treason, or other offence, by act of parliament, or otherwise by any process of law,"—on which Sir M. Foster observes, "Here is a clear and full parliamentary declaration, that, by the ancient law and constitution of England, founded on principles of reason, equity, and good conscience, the allegiance of the subject is due to the king, for the time being, and to him alone"—and this is confirmed by Lord Coke. With respect, therefore, to the duty of allegiance, the only question is, who is the sovereign in possession; if the usurper is in possession, allegiance is due to him as sovereign lord, for the time being; and it must follow, that, as the subject cannot owe a divided allegiance, the rightful heir, even though he continue his style, title, and claim, cannot, during his exclusion, be within the statute of treason; and, surely Lord Hale's doctrine of a king, *quasi* in possession, something between a king *de jure* and a king *de facto*, is too vague and indefinite to form a rational or legal distinction.

Post. Cr. L. 399; 3 Inst. 6; and vide 3 Hallam's Midd. Ages, 291.||

It was resolved by the judges, in the case of Sir H. Vane,^(a) that King Charles the Second was king *de facto*, as well as *de jure*, from his father's death; and that therefore all those who acted against and kept him out of possession, in obedience to the powers then in being, were traitors.

Keiling, 14, 15; Keb. 315. ^(a) Mr. Justice Foster says, that the rule laid down by the court in this case, involved, in the guilt of treason, every man in the kingdom who had acted in a public station under a government possessed *in fact* for twelve years together of a sovereign power; and that Ld. Cf. J. Hale, when of high rank at the bar, took the engagement "To be true and faithful to the Commonwealth of England, *without a King or House of Lords*." *This, in the sense of those that imposed it, was plainly an engagement for abolishing kingly government, at least for supporting the abolition of it; and with regard to those who took it, it might, upon the principles of Sir H. Vane's case, have been easily improved into an overt act of treason against King Charles the Second.* Post. R. 402.

[But it ought to be considered, that it was first resolved by the same judges that King Charles the Second was king *de facto* as well as *de jure* from his father's death; and it is apparent, that no other person was in possession of any sovereign power known to our laws.

1 Hawk. P. C. c. 17, § 10. Hence the statutes passed in the first year after the restoration of King Charles the Second are always called the acts in the twelfth year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.]

By the 1 Mar. stat. 3, c. 1, § 3, "The kingly office of this realm, and all prerogative, royal power, authorities and jurisdiction thereunto annexed, being invested in ^(b) either male or female, are as absolutely invested in the one as the other."

^(b) The queen regent, as were Q. Mary and Q. Elizabeth, is a king within the 32 E. 3, stat. 5, c. 2; Hal. Hist. P. C. 101; but a titular king, as the husband of a queen regent, is not. 3 Inst. 8; Hawk. P. C. c. 17, § 20.

By the 1 W. & M. stat. 2, c. 2, § 9, "Every person that shall be reconciled to, or held communion with, the see or church of Rome; or shall profess

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the popish religion; or shall marry a papist; shall be incapable to inherit or enjoy the crown of this realm and Ireland; and in such case the people shall be absolved from their allegiance, and the crown shall descend to such persons, being protestants, as should have inherited the same, in case the person so reconciled, &c., were dead."

And by § 10, "Every king and queen, who shall come to and succeed in the imperial crown of this kingdom, shall, on the first day of the meeting of the first parliament next after his or her coming to the crown, sitting in the throne of the House of Peers, in the presence of the lords and commons, or at his or her coronation, before such person as shall administer the coronation oath, at the time of taking the said oath, (which shall first happen,) make, subscribe, and repeat the declaration mentioned in the statute 30 Car. 2, *for preserving the king's person and government, by disabling papists from sitting in either house of parliament.*"

The king, as king, cannot be a minor; so that grants, leases, &c., made by him, though under age, bind presently, and cannot be avoided by him, either during his minority, or when he comes of age; for the politic rules of government have thought it necessary, that he who is to govern and manage the whole kingdom, should never be considered as a minor incapable of governing himself and his own affairs.

Dyer, 209, pl. 22; Plow. 209. Case of the Duchy of Lancaster; Co. Lit. 43; 5 Co. 27; Raym. 90. [But it hath been usually thought prudent, when the heir apparent hath been very young, to appoint a protector, guardian, or regent, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian. 1 Bl. Comm. 248.]

(B) of the King's Prerogative as universal Occupant: And herein,

1. *That he is universal Occupant, and entitled to all derelict Lands.*

THE king by our law is universal occupant, and all property is presumed to have been originally in the crown; (a) and that he partitioned it out in large districts to the great men who had deserved well of him in the wars, and were able to advise him in time of peace. Hence it is said, that the king hath the direct dominion; and that all lands are holden mediately or immediately from the crown.

Co. Lit. 1; Dyer, 154; Bendl. 237; Seld. Mare Claus. 223. (a) A fiction of law, adopted by the constitution to answer the ends of government, but for the good of the people, the great object of the law and constitution of this country.—The right of the people of England to their property does not depend upon nor was in fact derived from any royal grant. The reception of the feudal policy, in this nation, exactly answers the definition of a fiction; which is some supposition in law, for a good reason, against the real truth of a fact, in a matter possible to have been actually performed, according to that supposition. Cons. on Law of Forfeiture, 55.

Hence it is, that if the sea leaves any shore by a sudden falling off of the water, such derelict lands belong to the king: but, if a man's lands, lying to the sea, are increased by insensible degrees, they belong to the soil adjoining.

Dyer, 325; 2 Roll. Abr. 170; {2 Johns. Rep. 322, 323, *Emans v. Turnbull* and others. So the gradual additions made to the shores of rivers by alluvion, from natural causes, or from an union of natural and artificial causes, belong to the owners of the shores. 3 Mass. T. Rep. 352, *Adams v. Frothingham*.} || See post, p. 18, || β“ 3. Of his Prerogative in Seas and Navigable Rivers,” and *The People v. The Canal Appraisers*, 13 Wend. 355; *Canal Com. v. the People*, 5 Wend. 423; *Murray v. Sermon*, 1 Ruff. 96; *Storn v. Freeman*, 6 Mass. 435; *Commonwealth v. Charlestown*, 1 Pick. 180; *Cochran v. Fort*, 7 New S. 634; *Cambre v. Kohn*, 8 New S. 576; *Henderson v. Mayor*, 5 Louis.

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R. 422; *Livingston v. Hermann*, 9 Mart. 656; *Girard v. Hughes*, 1 Gill. and Johns. 249; *Handly v. Anthony*, 5 Wheat. 380; 2 Am. Law Jour. 307; 5 Am. Law Jour. 167; *Emans v. Turnbull and others*, 2 Johns. R. 322; *Adams v. Frothingham*, 3 Mass. 352; *Freytag v. Powell*, 1 Whart. 536; *New Orleans v. United States*, 10 Pet. 662. A mere intruder is limited to his actual possession, the rights of a riparian proprietor do not attach to him. *Watkins v. Holman*, 16 Pet. 55. Vide tit. *The Court of Admiralty*, vol. 2, p. 735.g

So if a river, so far as there is a flux of the sea, leaves its channel, it belongs to the king; for the English sea and channels belong to the king; and he hath a property in the soil, having never distributed them out to his subjects.

2 Roll. Abr. 170.

But, if a river, in which there is no tide, should leave its bed, it belongs to the owners on both sides; for they have in that case the property of the soil; this being no original part or appendix to the sea, but distributed out as other lands.

2 Roll. Abr. 170; *β Ex parte Jennings*, 6 Cowen, 518; *People v. Seymour*, 6 Cowen, 579; *Murray v. Sermon*, 1 Ruff. 56. See *Arnold v. Munday*, 1 Halst. 1; *Deerfield v. Arms*, 17 Pick. 41; *Bardwell v. Ames*, 22 Pick. 333; *King v. King*, 7 Mass. 496; *Ingraham v. Wilkinson*, 4 Pick. 268; *Hatch v. Dwight*, 17 Mass. 289—299; *Cooper v. Williams*, 4 Ohio, 286.g

If land be drowned, and so continue for divers years; if it be after regained, every owner shall have his interest again, if it can be known by the boundaries.

8 Co., Sir Francis Barrington's case.

It is said that there is a custom in Lincolnshire, that the lords of manors shall have derelict lands; and that such is a reasonable custom; for if the sea wash away the lands of the subject, he can have no recompense, unless he should be entitled to what he regains from the sea.

2 Mod. 107.

Information by English bill in the Exchequer-chamber for one hundred acres of derelict lands in Lincolnshire; the case was this: King James the First granted to J S the manor of Holbeck, with the appurtenances, by express words; and in the letters patent there was the following clause, *neque non totum illud fundum et solum et terras suas contigue adjacentes*. to the premises, *quæ sunt aquâ cooperta, vel quæ in posterum de aqua possunt recuperari, &c., non obstante non nominando valorem, qualitatem sive quantitatem, &c.*; and these hundred acres being afterwards improved and recovered from the sea, the question was, Whether they passed to the patentee? and though it was urged in his behalf, that these words were as general as they well could be; that the king was entitled to the soil of the sea, not as a matter of prerogative only, but as an interest which he might grant; that in some cases the king may grant a possibility; that the *non obstante* was so particular in this case, as if intended to cure all defects; and that the king's grants ought to be construed liberally, as most for his honour: yet, it being urged on the other side, that these words were too general; that though they might be intended to pass some small parcels or lines of land which may become derelict, yet not so as to pass any great tracts of land; and that, by the construction contended for, all the lands between that and Denmark might pass; and admitting the king might grant part of his seas, yet that must be by express name: It was held by Montague, Ch. B., with the advice of Rainsford and North, Ch. Justices,

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that the patent, as to these hundred acres which became derelict, was void.

2 Lev. 171 ; 2 Mod. 106 ; Raym. 241, S. C. ; Attorney-General v. Sir Edward Farmer. *§* As to the effect and construction of a royal grant of lands and rivers. See Martin v. Waddell, 16 Pet. 367 ; Attorney-General v. Burridge, 10 Price, 350 ; Sommersett v. Segwell, 1 D. & R. 347 ; Williams v. Wilcocks, 8 Ad. & Ell. 314.*g*

2. Of his Prerogative in Escheats.

An escheat may be either *per defectum sanguinis*, or *per delictum tenentis*.(a) But is said, that in case of an attainer of felony, the escheat to the lord is *pro defectu tenentis* ; and the not descending, the consequence of the corruption of the blood ; but in case of treason, the lands come to the crown as an immediate forfeiture, and not as an escheat,

Co. Lit. 13, 92 ; Godb. 211. (a) That if the party be pardoned there can be no escheat. Owen, 87.

If the king's tenant dies without heir, the lands shall escheat and revert again to the crown ; but the lands holden of any (b) other lord shall, for want of the heirs of the tenant, escheat to the lord.

2 Inst. 64 ; Keilw. 104 ; 2 Roll. R. 251 ; 4 Inst. 224. (b) That the lord by escheat is in the *post*, and cannot vouch. 1 Co. 1.

If lands held of the king as of an honour come to him by a common escheat, as the tenant's dying without heir, or committing felony, these lands are part of the honour ; otherwise, if forfeited for treason, for then they come to the king by reason of his person and crown ; and if he grants them over, &c., the patentee shall hold of the king in chief.

2 Inst. 64.

It was found by special verdict, that the Prior of Merton was seised of a house in Southwark, held of the Archbishop of Canterbury, as of his borough of Southwark ; and 30 Hen. 8 surrendered it to the king, who granted the said messuage and divers other lands in London, Middlesex, and Essex, to J S and his heirs, to hold of him *in libero burgagio*, by fealty, for all services and demands, and not *in capite* ; that afterwards Queen Mary granted the manor and borough of Southwark to the mayor and commonalty of London ; and the tenant of the said messuage died without issue ; and the question was, Whether Queen Eliz. or the patentees of the borough should have the escheat ? and adjudged for the queen ; for the first patentee of the messuage held it of the queen in socage *in capite*, as of a seignory in gross ; and the words *in libero burgagio* are merely void ; for the land out of the burgh cannot be held *in libero burgagio* ; and there shall not be several tenures ; for one tenure was reserved by the king for all ; and therefore of necessity it shall be a tenure in socage of the king.

Cro. Eliz. 120, May v. Street.

Upon an attainer of high treason, the king by his prerogative shall have all the lands of inheritance whereof the offender was seised in his own right : and also all rights of (c) entry to lands in the hands of a disseisor or other wrong-doer ; though such lands are holden of another : but, in case of petit treason and felony, they go to the lord of whom they are holden ; for the blood being corrupted, so that no person can represent him, it is the same as if he had died without heir ; and, consequently, the lord is in by escheat.

Co. Lit. 8 ; 3 Inst. 19. (c) But a right of action, which consists only in privity,

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cannot escheat. 3 Co. 2 b. *β* No attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted. Cons. U. S. art. 3, sect. 3. *g*

But the lord cannot enter into the lands holden of him upon an escheat for petit treason or felony, without a special grant: till it appears by due process, that the king hath had his prerogative of the year, day, and waste.

Stamf. P. C. 191.

If one attainted of felony commits treason afterwards, and is thereof attainted, as he may be, because the offence is of a higher nature than felony; yet this shall not divest the right of escheat, which by the felony was lawfully vested in the lord, contrary to the opinion of Stamford; for the act of the party shall not divest the lawful escheat of the lord.

3 Inst. 213.

If one seised in fee of a fair, market, common, rent-charge, or seck, warren, corrody, or other inheritance not holden, is attainted of felony, the king shall have the profits of them during his life; but after his death they cannot descend, because his blood is corrupted; nor escheat, because not holden; but perish and are extinct by act in law.

3 Inst. 21.

If a man grant an advowson in gross to another in fee, and the grantee die without heir, it seems that this shall revert to the grantor, not being held of any man; for it is a thing that cannot vanish, but ought to be in some person: but in that case, if the grantor cannot have it, the king shall have it as supreme patron; and for that reason ought to present where none hath right.

Roll. Abr. 816; Comp. Incumb. 75.

If a disseisor makes a feoffment, or dies seised; and after the disseisee dies without heir, there shall be no escheat, because the lord hath a tenant by title.

Co. Lit. 268 b.

Though the lord hath not been seised of his services within the time of limitation, yet, if the tenant dies without heir, the land shall escheat; for at the time of the escheat the seignory remained, though seisin of the services was wanting.

4 Co. 11.

If an infant or *non compos* in person make a feoffment, and after die without heir, (a) the land shall not escheat: otherwise, if made by letter of attorney, for then the feoffment is void.

4 Co. 125. (a) Dyer, 10 pl. 38, S. P., because the lord hath a tenant by title.—If J S conveys land to trustees and their heirs, to the use of himself for life, remainder to his first and every other son, &c., remainder to his own right heirs, and *cestui que trust* dies without heirs, *quere*, Whether the lands shall escheat or remain with the trustees? [In the case of Burgess v. Wheate, the Master of the Rolls, (Sir Thomas Clarke,) and the Lord Keeper Henley, held, against my Lord Mansfield, that the crown could not in equity, upon a failure of the heirs of *cestui que trust*, claim against a trustee by escheat, if he had the legal estate in him, for that (among other reasons) the title by escheat could only arise where there was a defect of a tenant; that where there was a feoffee there was a tenant, whether he were beneficially entitled or not; so that the principle of escheat failed. 1 Bl. Rep. 123; || 1 Eden R. 177.] The authority of this case, however, hath been somewhat shaken by the intimation of Lord Thurlow's opinion in Middleton v. Spicer, 1 Bro. Ch. Ca. 204.—Where the character of land is not imperatively and definitely fixed upon money by the terms of a will or other instrument, a court of equity will not order it to be laid out in land, in order to let in the crown claiming by escheat. Walker v. Denne, 2 Ves. jun. 170.

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If he who hath title to a writ of escheat accept homage or fealty of the tenant, this will bar him; otherwise if he accept rent of the tenant; for that may be done by a bailiff.

Co. Lit. 268; *β* Kelly v. Greenfield, 2 Har. & M'Hen. 138.*g*

If there be lord and tenant, and the tenant be disseised, and the disseisee die without heir, and after the lord accept the rent from the disseisor, this is no bar to him: otherwise, if he avow upon the disseisor for the rent.

Co. Lit. 268.

But if, after title of escheat accrued, the disseisor make a feoffment or die seised, the acceptance of the rent from the feoffee or heir will be a bar.

Co. Lit. 268.

If one lease a manor for life or years, and a tenancy escheat, (*a*) this belongs to the manor held in farm, for which the lessor shall have a general writ, and suppose a lease by him made of the lands escheated, and maintain it by the special matter.

2 Inst. 146. (*a*) After the death of the tenant for life the lessor may have a writ of escheat, and the words of the writ are true, viz., that the tenant that died, &c., held the lands of him. Keilw. 114 a.—The tenancy comes in lieu of seigniori. Co. 122.

For the better taking care of the king's escheats there is an ancient officer named by the lord treasurer, (*b*) and called escheator, because his office is properly to look to escheats, wardships, and other casualties belonging to the crown. (*c*)

Co. Lit. 13 b. (*b*) By the 14 E. 3, c. 8, to be chosen by the chancellor, &c., as sheriffs; by 12 E. 4, c. 9, must have a freehold in the same county worth 20*l.* per ann.; by the 1 H. 8, c. 8, must have forty marks yearly; by the statute 14 E. 3, st. 1, c. 8, there shall be as many escheators as when King Edward came to the crown, viz., one in every county.—But anciently there were but two, one on this side Trent, and the other beyond Trent, but they had sub-escheators. Co. Lit. 13 b. (*c*) To inquire of casual profits, and seize them into the king's hands, that they may be answered to him. Co. Lit. 92 b.

|| The statutes 8 Hen. 6, c. 16, and 18 Hen. 6, c. 6, provide that no lands which are seized to the king upon inquest before escheators, shall be let to farm until the return of the inquest, and one month afterwards, unless the party grieved by such inquest shall traverse the same, and offer to take the lands to farm until the determination of the traverse, in which case they shall be let to such party.

And it has been decided that these statutes extend to the case of an escheat upon the death of a tenant last seised without heirs, where no immediate tenure of the crown was found by the inquest: and as the crown could not grant to a stranger in such case without office, so neither could a plaintiff in ejectment recover on the demise of the crown, which must be considered as a grant: and the inquisition being void under the statute 2 & 3 Edw. 6, c. 8, § 8, for not finding of whom the lands were holden, was held not sufficient to support the grant.

Doe dem. Hayne, and His Majesty v. Redfern, 2 East, 96.

It seems doubtful whether a person claiming as heir of a bare trustee can be allowed to traverse an inquest of escheat.

1 Madd. 582.||

If the inheritance of lands escheat to the king, although he is in the *post*, yet he shall have a term that was limited to attend the inheritance.

Vern. 357, Attorney-general v. Thrupton. *β* If there is a failure of inheritable blood,

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by reason of alienage, the lands do not escheat, but go to the next heir (who is not an alien) of the person last seised. Lessee of Elmendorf v. Jackson, 7 Johns. 214. Where land escheats by reason of the alienage of the heir, the heir of a creditor of the ancestor is not divested thereby. Movers v. White, 6 Johns. Ch. 367; Austin v. Brown, 6 Paige, 448; West v. West, 8 Paige, 443; 3 My. & Keen, 383; 1 Beav. 79; 4 My. & Craig, 525; 1 B. Munroe, 141. In case of the death of an intestate without heirs or known kindred, the commonwealth has the same remedy on the administration bond as the next of kin would have had, but cannot pursue it until her right by escheat has been duly established. Crawford v. The Commonwealth, 1 Watts, 480; Vaux v. Nesbitt, 1 M'Cord, 352; Craig v. Radford, 3 Wheaton, 594. But see Mooers v. White, 6 Johns. Ch. 360; Stevenson v. Dunlap, 7 Munro, 134, 143; Hall v. Getting's lessee, 2 Har. & J. 112; Alexander v. Greenup, 1 Munf. 134. An inquisition in escheat which does not find that the decedent died intestate and without heirs or known kindred, is a nullity. Crawford v. The Commonwealth, 1 Watts, 480; Dunlop v. The Commonwealth, 2 Call, 284; as to the traverse of an inquisition see Stokes v. Dawes, 4 Mason, 268; Armstrong v. Short, 1 Ruff. 11; The People v. Cutting, 3 Johns. 1; S. C. 2 Johns. 454; Clark v. Caldwell, 6 Wharton, 139; Bonsal v. Chancellor, 5 Whart. 371; Case of De Silver's estate, 5 Rawle, 111. And as to escheats generally, see Kelly v. Greenfield, 2 Har. & M'Hen. 137; Bladen v. Cockey, 1 Har. & M'Hen. 230; Carvil v. Griffith, 1 Ibid. 297; Hutchins v. Erickson, Ibid. 339; Gilmore v. Kay, 2 Hayw. 108; City Council v. Range, Rep. Con. Ct. 454; Elmendorf v. Carmichael, 3 Litt. 481; Ewings v. Norwood, 2 Har. & J. 96; Hall v. Getting's lessee, Ibid. 122; Wilbur v. Sobey, 16 Pick. 177; Sewall v. Lee, 9 Mass. 363; Irezward v. Howard, 3 Desaus. 87, Ibid. 213; Day v. Murdock, 1 Munf. 460; Mooers v. White, 6 Johns. Ch. 360; Orr v. Hodgson, 4 Wheat. 453; Fairfax v. Hunter, 7 Cranch, 603, 619; Jackson v. Saunders, 2 Leigh, 109; Hubbard v. Goodwin, 3 Leigh, 492; Craig v. Radford, 3 Wheat. 594; Bradwell v. Weeks, 1 Johns. Ch. 206; 13 Johns. Ch. 1.g

|| It is the ordinary practice with the crown to give a lease to the party discovering an escheat.

7 Ves. jun. 71.||

3. Of his Prerogative in Seas and Navigable Rivers.

It is universally agreed, that the king hath the sovereign dominion in all seas and great rivers; which is plain from Selden's account of the ancient Saxons, who dealt very successfully in all naval affairs, and therefore the territories of the English seas and rivers always resided in the king.

Seld. Mar. Cl. 251, &c.; Roll. Abr. 168, 169; 5 Co. 106; 10 Co. 141. [In the narrow seas, that is, the seas which adjoin to the coasts of England, the king hath a double right, viz., a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety, or ownership. This right of propriety, or ownership is evidenced, 1st, in the right of fishing in these seas and the arms and creeks thereof, which is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is owner of a private or inland river; and 2d, from the king's right of propriety to the shore, and the *maritima incrementa*. See 2 Johns. Reports, 357, Cortelyou v. Van Brunt; 1 Mass. Term Rep. 231, Austin v. Carter; 5 Wheat. 374, Handly's lessee v. Anthony et al.; 16 Peters, 367, Martin v. Waddell; 20 Johns. 90, Hooker v. Cumming; 17 Johns. 195, People v. Platt; 3 Cain 318, Palmer v. Mulligan; 2 Johns. 175, Jacobson v. Fountain; Bennett v. Boggs, 1 Baldwin, 70; Van Aulen v. Decker, 1 Pennington, 108; Coolidge v. Williams, 4 Mass. 140; Inhabitants, &c. v. Baker, 4 Mass. 522; Burnham v. Webster, 5 Mass. 266; Hunchel v. McCulloch, 10 Mass. 71; Chalker v. Dickinson, 1 Conn. 382; Jay v. King, 5 Day, 72; Peck v. Lockwood, 5 Day, 21; Pitkin v. Olmstead, 1 Root, 217; Ingraham v. Hutchinson, 2 Conn. 584; Post v. Mann, 1 South. 61; Van Aulen v. Decker, 1 Penning. 108; Hayden v. Noyes, 5 Connecticut, 391; Munson v. Baldwin, 7 Conn. 168; Waters v. Lilly, 4 Pick. 145; Comm. v. Chapin, 5 Pick. 199; Vinton v. Welsh, 9 Pick. 87; Melvin v. Whiting, 7 Pick. 79; Freary v. Cooke, 14 Mass. 488; Nickerson v. Brackett, 10 Mass. 212; Arnold v. Mundy, 1 Hals. 1; Yard v. Carmin, 2 Pennington, 936; Devonshire v. Smith, 1 Alcock & Napier, 422, & S. P. Ibid. 459; Malden v. Woolvet, 4 Perr. & D. 26; Horne v. M'Kenzie, 6 Clark & Fi. 628; Williams v. Wilcocks, 8 Ad. & Ell. 314.g The shore, as to this purpose, is the land lying between high water and low water-mark in

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ordinary tides; and this {'} land belongeth to the king *de jure communi* both in the shore of the sea, and the shore of the arms of the sea. And that is called an arm of the sea where the tide flows and reflows, and so far only as the tide flows and reflows. 29 Ass. 93, (D.) The *maritima incrementa* are of three kinds. 1. *Per projectionem vel alluvionem*. 2. *Per relictionem vel desertionem*. 3. *Per insulæ productionem*. The increase *per alluvionem* is, when the sea by casting up sand and earth doth, by degrees, increase the land, and shut itself out farther than the ancient bounds went; and this is usual. The reason why this belongs to the crown is, because, in truth, the soil, where there is now dry land, was formerly part of the very *fundus maris*, and, consequently, belonged to the king. But, indeed, if such alluvion be so insensible, that it cannot be by any means found that the sea was there, *idem est non esse et non apparere*, the land thus increased belongs as a perquisite to the owner of the land adjacent.—As to the increase *per relictionem*, or recess of the sea, this doth *de jure communi* belong to the king; for as the sea is part of the waste or demesne, so of necessity the land that lies under it, and therefore it belongs to the king when left by the sea: and so also it regularly holds in lands deserted by a river, that is an arm of the sea or creek of the sea *primâ facie*, especially, if the creek or river be part of a port.—And as to islands arising *de novo* in the king's seas, or the king's arms thereof, these upon the same account and reason *primâ facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king: for when islands *de novo* arise, it is either by the recess or sinking of the water, or by the exaggeration of sand and slab, which in process of time grow firm land environed with water; and thus some places have arisen, and their original recorded, as about Ravesend in Yorkshire. Hale De Jure Maris, c. 4. || See 3 Barn. & C. 91; 4 Barn. & C. 495; and *post.* p. 21. || {'} Vide 2 Johns. Rep. 357, Cortelyou v. Van Brunt; 1 Mass. T. Rep. 231, Austin v. Carter.}

β All waters below the line of low water-mark on the sea coast, and where the tide flows, and also the waters to high water-mark, are properly high seas.

The Sloop Abby, 1 Mason, 360.

A grant of land "bounded east by the river Mobile," covers the ground between high and low water-marks.

City of Mobile v. Emanuel, 1 Howard, 95; City of Mobile v. Hallett, 16 Peters, 261; and see Handly's lessee v. Anthony, 5 Wheat. 374; Horn v. McKensie, 6 Clark & F. 628; and Bouv. Law Dic. tit. *High Seas*, and cases there cited. g

And, as the king hath a prerogative in the seas, so hath he likewise a right to the fishery and to the soil; so that if a river, as far as there is a flux of the sea, leaves its channel, it belongs to the king.

Dyer, 326; 2 Roll. Abr. 170.

Hence the admiralty court, which is a court for all maritime causes, or matters arising upon the high sea, is deemed the king's court; and its jurisdiction derived from him who protects his subjects from pirates, and provides for the security of trade and navigation.

4 Inst. 142; Molloy, 66. For this court and its jurisdiction, and how far it extends, vide tit. *Court of Admiralty*. β The Jefferson, 10 Wheat. 428; United States v. La Vengeance, 3 Dall. 297; Peyroux v. Howard, 7 Peters, 324; Gardner v. Ship New Jersey, 1 Pet. Adm. Dec. 228; Thackaray v. The Farmer, 1 Gilpin, 529; Stevens v. The Sandwich, Ibid. 233; Mason v. The Blaircau, 2 Cranch, 264; United States v. Schooner Sally, Ibid. 406; The Aurora, 1 Wheat. 96; The Gen. Smith, 4 Wheat. 438; The St. Jago de Cuba, 9 Wheat. 409; The Jerusalem, 2 Gall. 345; Munro v. Almeida, 10 Wheat. 473; De Lovio v. Boit, 2 Gall. 398; The Anne, 1 Mason. 109; Chamberlain v. Chandler, 3 Mason, 242; Sloop Mary, 1 Paine, 671; Shepherd v. Taylor, 5 Peters, 675; Hobart v. Drogan, 10 Peters, 108; Orleans v. Phœbus, 11 Peters, 175; Baines v. Schooner James and Catherine, 1 Bald. 544; Zane v. Brig President, 4 Wash. C. C. R. 453; Hallett v. Lamothe, 3 Murp. 279; United States v. Coombes, 12 Peters, 72; The Sarah, 8 Wheat. 394; United States v. Peters, 3 Dall. 121; 9 Wheat. 402; 9 Cranch, 289; 1 Gall. 448; 5 Cranch, 204; 4 Cranch, 443; 2 Wheat. 1; 7 Cranch, 112; 10 Wheat. 473; 4 Mason, 380; Bee, 60, 369—378; 1 Sumner, 157; 3 Mason, 161; 1 Sumner, 551; 2 Sumner, 589; 1 Rob. Adm. 21, 143, 154; 2 Gall.

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36, 336.g || See *antè*, tit. *Piracy*, as to the jurisdiction of the admiral, and the place to which it extends, *infra corpus comitatis*.||

From the king's dominion over the seas it was holden, that the king as protector and guardian of the seas might, before any statute made for commissions of sewers, provide against inundations by lands, banks, &c., and that he had a prerogative herein as well as in defending his subjects from pirates, &c.(a)

10 Co. 111, Case of the Isle of Ely. [(a) The commission enacted by st. 28 H. 8, c. 5, recites this part of the king's jurisdiction, viz., "We therefore, for that by reason of our royal dignity and prerogative royal we are bound to provide for the safety and preservation of our realm," &c. This prerogative of the crown Lord Hale calls an *interest of jurisdiction*, viz., in reference to common nuisances. "And," he says, "another part of the king's jurisdiction in reformation of nuisances, is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats; to reform the obstructions or annoyances that are therein to such common passage: for as the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called *altæ viæ regie*, so these public rivers for public passage are called *fluvii regales*, and *haut streames le roy*; not in reference to the propriety of the river, but to the public use; all things of public safety or convenience being in a special manner under the king's care, supervision, and protection. And therefore, the report in Sir John Davyes, of the piscary of Ban, mistakes the reason of those books, that called these *streames le roy*, as if they were so called in respect of propriety, as 19 Ass. 6, Dy. 11, for they are called so, because they are of public use, and under the king's special care and protection, whether the soil be his or not. Hale, De Jure Maris, by Hargrave, p. 8.] {See 3 Cain. 312, 315, 318, Palmer v. Mulligan; 2 Bin. 475, Carson v. Blazier.}

But notwithstanding the king's prerogative in seas and navigable rivers, yet it hath been always held, that a subject may fish in the sea: for this being a matter of common right, and the means of livelihood, and for the good of the commonwealth, cannot be restrained by grant or prescription.

3 E. 4, 18, 19; Bro. *Custom*, 46; Fitz. *Bar.* 93; Mod. 105; 2 Salk. 637, pl. 4. {Willes, 265, Ward v. Creswell;} || 2 Bos. & Pul. 472. || [Although *primâ facie* an arm of the sea be in point of propriety the king's, and *primâ facie* it be common for every subject to fish there, yet a subject may have by usage a several fishery there, exclusive of that common liberty which otherwise of common right belongs to all the king's subjects. See Hale, De Jure Maris, cap. 5, and the several authorities there collected.] {2 Bos. & Pul. 472, Bagot v. Orr;} || 4 Term R. 439. ||

Also it is held, that every subject of common right may fish with lawful nets, &c., in a navigable river as well as in the sea; and the king's grant cannot bar them thereof; but the crown only has a right to royal fish; and that the king only may grant.

6 Mod. 73; Warren v. Matthews, Salk. 357, pl. 4; S. C. and S. P. *Per* Holt, C. J., on a claim of *solum piscariam* in the river Ex by grant from the crown. 83 Cain. 312, Palmer v. Mulligan; 2 Bin. 475, Carson v. Blazier; 12 Peters, 91, City of Georgetown v. The Alexandria Canal Co.; 14 S. & R. 71, Shrunk v. Schuylkill Navigation Co.; 34 S. & R. 12, Commonwealth v. Shaw; 1 Wendell, 237, Rogers v. Jones; 20 Johns. 90, Hooker v. Cummings; 6 Cow. 369; Gould v. James; 2 Johns. 175, Jacobson v. Fountain; 16 Peters, 367, Martin v. Waddell; 1 Bald. 70, Bennett v. Boggs; 1 Halsted, 1, Arnold v. Munday; 1 South. 61, Post v. Munn; 1 Alcock & Napier, 442, Devonshire v. Smith; Malden v. Woolvet, 4 Per. & D. 26; Williams v. Wilcocks, 8 Ad. & Ell. 314.g || See *antè*, tit. *Piscary*, and 5 Barn. & C. 875. || β The right of fishery is incident to the owner of the soil over which the water passes, and, when a stream is owned by two or more, to the several riparian proprietors. 6 Cowen, 369; 5 Mason, 191; 4 Pick. 145; 5 Pick. 199. Vide Bouv. L. D. tit. *Fishery*; and *antè*, "3. Of his Prerogative on Seas and Navigable Rivers;" 3 Dev. 59.g

[And as a subject may have a right of fishing in the sea and the arms

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thereof, so the shore, that is, the land, which lies between high water and low water-mark at ordinary neap-tides, may belong to a subject. The statute of 7 Jac. 1, c. 18, supposeth it; for it provides, that those of Cornwall and Devon may fetch sea-sand for the bettering of their lands, and shall not be hindered by those that have their lands adjoining to the sea-coasts, which it appears by the statute they were formerly. Vide *Cartæ Antiquæ*, D. D., n. 24, the charter of Alan de Percy to the monks of Whitby, and the bounds thereof, viz., *totam marinam a portâ de Whitby usque Blowick, &c., et usque Terdiso, et usque in mare, et per marinam in Whitby*, confirmed by King Henry the First. And the bounds of that abbey's possessions take in many creeks of the sea, yet are given by a subject, viz., Derwent, Muse, Ese, &c.

Hale de Jure Maris, c. 6.

The shore may not only belong to a subject in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor. And the evidences to prove this fact are commonly these—constant and usual fetching gravel and sea-weed and sea-sand between the high water and low water-mark, and licensing others to do so; enclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand; presentment and punishment of purprestures there in the court of a manor; and such like.

Hale de De Jure Maris, c. 6. So agreed in Sir Henry Constable's case, 5 Co. 107; 5 E. 3; 3 Dy. 326 b. So in the Exchequer Chamber, P. 16 Car. inter l'Attorney-General et Sir Samuel Rolls, Sir Richard Buller, and Sir Thomas Arundel, *per omnes barones*. || See the case of Dickens v. Shaw, reported in Hall on the Rights of the Crown on the Sea-shore, *Appendix*. || *As* to what is to be considered *sea-shore*, see Hargr. Tr. 12; Ang. on Tide Wat. 34; 8 Kent, Com. 347; Civil Code of La., art. 442; Bouv. L. D. tit. *Sea-shore*: Just. Inst. 2, 1, 1; Merlin, Répertoire de Jurisp. mots, *Rivage de la mer*; Dane's Ab. c. 68 a, 3, 4; 1 Mason, 360; 1 Howard, 95; 16 Peters, 261; 5 Wheat. 374; Chapman v. Kimball, 9 Con. 38.g

And as it may be parcel of a manor, so it may be parcel of a vill or parish. And the evidence for that will be usual perambulations, common reputation, known metes and divisions, and the like. And upon this account the parson of Sutton, about 14 Car. 1, had a verdict for the tithes of Sutton Marsh, in Lincolnshire, upon a long and a great evidence: though it appeared, that within time of memory it was the mere shore of the sea covered at ordinary tides, and without the old sea bank.

Hale, *ubi supra*.

And it may not only be parcel of a manor, but *de facto* it many times is so, and perchance it is parcel of almost all such manors as by prescription have royal fish or wrecks of the sea within their manor. For, for the most part, wrecks and royal fish are not, nor indeed cannot, be well left above the high water-mark, unless it be at such extraordinary tides as overflow the land: but these are perquisites which happen between the high water and low water-mark; for the sea withdrawing at the ebb leaves the wrecks upon the shore, and also those greater fish, which come under the denomination of royal fish.

Hale, *ubi supra*.

|| It hath been decided that *primâ facie* every subject has a right to take fish found upon the sea-shore, between high and low water-mark; but such general right may be abridged by the existence of an exclusive right in some individual. And the public have not any common law right

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of bathing in the sea, and as incident thereto, of crossing the sea-shore on foot, or with bathing machines for that purpose.

Bagott v. Orr, 2 Bos. & Pul. 472; Blundell v. Catterall, 5 Barn. & A. 268. See remarks on the doctrine of this case, and that of Bagott v. Orr, *suprà*; Hall on the Rights of the Crown on the Sea-shore, p. 184.

Nor have they a common law right to tow on the banks of ancient navigable rivers.

Ball v. Herbert, 3 Term R. 253.||

And as the shore may thus belong to a subject, so in some instances may the *maritima incrementa*. Hence custom and prescription may give the *jus alluvionis* to the land whereunto it accrues. But custom cannot entitle the subject to *relicted* lands, or make them parcel of a manor. For the soil from under the water must needs be of the same propriety as it is when covered with water. If the soil of the sea, while it is covered with water, be the king's, it cannot become the subject's because the water hath left it. But in the case of *alluvio maris*, it is otherwise, because the accession and addition of the land by the sea to the dry land gradually is a kind of perquisite, and an accession to the land; and therefore, in case of private rivers, it seems by the very course of the common law such a gradual increase *cedit solo adjacenti*; and though it may be doubtful whether it be so *ex jure communi* in case of the king, yet doubtless it gives a reasonableness and facility for such right of *alluvio* to be acquired by custom; for though in every acquiescent *per alluvionem* there be a reliction or rather an exclusion of the sea, yet it is not a recess of the sea, nor properly a reliction.

Hale De Jure Maris, c. 6. || See *antè*, p. 14. || β When a navigable lake recedes gradually and insensibly, the land left uncovered belongs to the owner of the adjoining land; but if the recession be sudden, it belongs to the state. Murry v. Sermon, 1 Hawks, 56; Giraud v. Hughes, 1 Gill & Johns. 249; Emans v. Turnbull, 2 Johns. 322; Adams v. Frothington, 3 Mass. 352; Freytag v. Powell, 1 Whart. 536; New Orleans v. United States, 10 Peters, 662; People v. Canal Appraisers, 13 Wend. 355; Canal Com. v. The People, 5 Wend. 423; Murray v. Sermon, 1 Ruff. 96; Handy v. Anthony, 5 Wheat. 380; Ingraham v. Wilkinson, 4 Pick. 273; Hill & S. Railway, *in re*, 5 Mees. & W. 327; 3 B. & Cr. 91; 4 B. & Cr. 485; and see *antè*, (B) 1. β

|| The principle being settled, that land derelict by the sea belongs to the crown, and land formed by alluvion, and by the sea's casting up of sand and earth, belongs to the owner of the adjacent land, it becomes a mere question of fact and evidence in each particular case, whether the land in question falls within the one description or the other.

Where an inquisition found that a piece of land had in times past been covered with the water of the sea, but was then, and had been for several years past, by the sea *left*, and the commissioners caused the same to be seized into the king's hands; the defendant filed a traverse stating that he was seised in fee of the manor of North Thoresby, *cum N. C.*, and the demesne lands thereof, and that the said piece of land, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and other matters, being slowly, gradually, and by imperceptible increase in long time cast up, deposited, and settled, by and from the flowing and reflowing of the tide upon and against the extremity of the said manor, hath been formed, &c., and thereby became parcel of the demesne lands of the manor; without this, that the land was *left* by the sea as found by the inquisition. The replication by the Attorney-general traversed that the land was formed as alleged in the inducement to the

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defendant's traverse, and joined issue on the traverse taken by the defendant: and issue was joined on the traverse taken by the Attorney-general. It appeared by the evidence that the land in question had been formed by ooze and soil deposited by the sea; and that the increase could not be observed when actually going on, although a visible increase took place every year, and in the course of fifty years a large piece of land had thus been formed. It was held, that upon this evidence the land could not be said to have been *left* by the sea, and that it was formed by the slow, gradual, and imperceptible projection, &c., of ooze, soil, and sand, as alleged in the inducement to the defendant's traverse, and that both issues were properly found for him.

The King v. Lord Yarborough, 3 Barn. & C. 91; 5 Bing. 163, S. C.; and see 4 Barn. & C. 495.]]

But, though it be regularly true, that *terræ relictæ per mare* cannot be prescribed, yet a creek, arm of the sea, or *districtus maris*, may be prescribed in point of interest; and by way of consequence or concomitance, the land *relicted* there, according to the extent of such a precinct as was so prescribed, will belong to the former owner of such *districtus maris*. But otherwise it would be, if such prescription before the reliction extended only to a liberty, or *profit a prendre*, or jurisdiction only within that district; as, liberty of free fishing, admiral jurisdiction, or the jurisdiction of a leet, hundred, or other court; for such may extend to an arm of the sea, as appears by 8 E. 2, *corone*; for these are not any acquests of the interests of the water and soil, but leave it as it found it. Therefore the discovery of the extent of the prescription or usage, whether it extends to the soil or not, rests upon such evidences of fact as may justly satisfy the court and jury concerning the interest of the soil.

Hale, *ubi supra*.

And the same rule, which hath been observed before touching acquests by the reliction or recess of the sea, or the arms or creeks thereof, holds with respect to islands arising within those parts. Of common right and *primâ facie*, it is true, they belong to the crown: but, where the interest of a *districtus maris*, or arm of the sea, or creek, or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private property of a subject, will belong to the subject according to the limits and extent of such propriety. And therefore, if the west side of an arm of the sea belong to a manor of the west side, and an island happen to arise on the west side of *filum aquæ* environed with the water, the propriety of such island will entirely belong to the lord of the manor of the west side: and if the east side of an arm of the sea belong to a manor of the east side *usque filum aquæ*, and such an island happen between the east side and such a *filum aquæ*, it will belong to the lord on the east side: and if the *filum aquæ* divide itself, and one part take the east the other the west, and leave an island in the middle between both the *fila*, the one half will belong to the one lord, and the other to the other. But this is to be understood of islands that are newly made; for if a part of an arm of the sea, by a new recess from its ancient channel, encompass the land of another man, his propriety continues unaltered.

Hale, *ubi supra*.]

(B) As universal Occupant. (*Swans, Fishes, &c.*)

β Riparian owners are entitled to the additions made to their lands by gradual accretion from natural causes.

Hendly v. Anthony, 5 Wheat. 380; Giraud v. Hughes, 1 Gill and Johns. 249; Ingraham v. Wilkinson, 4 Pick. 273; Adams v. Frothingham, 3 Mass. 363; and see Commonwealth v. Shaw, 14 S. & R. 9; 2 Am. Law Journal, 307, 5 Id. 167; Morgan v. Livingston, 6 Mart. 216; Cochran v. Fort, 7 New S. 626; 11 Louis. R. 142; Cambre v. Kohn, 8 New S. 576; Henderson v. Mayor et al., 5 Louis. R. 422; Livingston v. Herman, 9 Mart. 656.

So where, by the erection of a dam in the river Schuylkill, a rock just below the dam, and above low water-mark, became surrounded by water at all times except at low tide, held that it still remained the property of the former owner, and did not become common property.

Commonwealth v. Shaw, 14 Serg. R. 9.g

4. Of his Prerogative in Swans and Royal Fishes.

The king, as a perpetual sign and acknowledgment of his dominion of the seas, hath several creatures reserved to him under the denomination of royal creatures, as swans, sturgeons, and whales; all which are the natives of seas and rivers.

7 Co. 16.

But a subject may have a property in swans three manner of ways:

First, by the acquisition of tame swans; viz., by buying tame swans, or by grant of the king of wild swans, and taming them; and then the subject shall have the property in them wheresoever they are, as of any other tame animal.

7 Co. 16 b.

If the cock swans of one man get into the hen swans of another, by the custom of England this brood shall be divided; and it shall not follow the female, according to the common right of accession. And this is founded on a natural observation on the moderation of this sort of creatures, that they will not couple with more than one; and so if they were to be separated they could never be propagated.

7 Co. 17 a; 2 Black. Com. 290, 291.

A custom that the owner of swans should have two cygnets, and the owner of the manor the rest, has been held good.

7 Co. 17 a.

Swans that are not the king's may be strays in a manor as well as any other creatures; and a man may prescribe to have swanning for them in another manor.

7 Co. 17 a.

β Trover lies for wild geese which have been tamed and strayed away, but without regaining their natural liberty, and the person finding them has no right to insist on a reward from the owner, nor more than his necessary expenses in keeping them.

Amory v. Flynn, 10 Johns. 102. As to wild bees, see Gillet v. Mason, 7 Johns. 16; Wallis v. Mease, 3 Binney, 546; Ferguson v. Miller, 1 Cowen, 243; Idol v. Jones, 2 Dev. 162.g

Secondly, the property of wild swans may be in the subject by a grant of swan-mark from the king; for, in this case, all the swans marked with such mark shall be the subject's wheresoever they fly.

7 Co. 17 a.

(B) As universal Occupant. (*Ports, Havens, &c.*)

A swan-mark may be granted over as well as the privilege of a park or warren.

7 Co. 17.

By the 22 E. 4, c. 6, "No person, other than the son of the king, shall have any mark or game of swans, except he have lands of freehold to the yearly value of five marks; and if any person not having lands to the said yearly value, shall have any such mark or game, it shall be lawful to any of the king's subjects, having lands to the said value, to seize the swans as forfeit; whereof the king shall have the one-half, and he that shall seize the other.

Thirdly, swans may be the subject's *ratione privilegii*; as, if the king grants to the subject the game of wild swans in such a river; but in such case, the subject cannot bring an action of trespass, *quare cygnos suos ibid. nidificant. or gignent. cepit*; for a man cannot call that his own, which he hath only during particular occupancy and possession in a certain place.

7 Co. 17.

If a man take away swans marked or pinioned, or those which are unmarked, if they be kept in a pond or private river, it is felony.

Hawk. P. C. c. 33, § 27. *β* Occupancy in wild animals is consummated only by possession, but such possession is not confined to manucaption, though it may be of such kind as to prevent escape. *Pierson v. Post*, 3 Cain. 175; and see *Buster v. Newkirk*, 20 Johns. 75; *Gillet v. Mason*, 7 Johns. 16; *Commonwealth v. Chase*, 9 Pickering, 15. Any person is justified in killing a ferocious (dog or other) animal which is permitted to run at large. *Putnam v. Payne*, 13 Johns. 312. The owner of a domestic animal is not liable for injuries committed by it unless he knew it was accustomed to do mischief. *Vrooman v. Lawyer*, 13 Johns. 339.*g*

The king shall have wreck of the sea, whales, and great sturgeons taken in the sea and elsewhere throughout the whole realm; (a) except in places privileged by the king.

St. de prerogativa regis, 15 E. 2, c. 11. [(a) To give the crown a right to such fish, they must be taken within the seas parcel of the dominion and crown of England, or in the creeks or arms thereof; for, if taken in the wide seas, or out of the precinct of the seas belonging to the crown of England, they belong to the taker. 39 E. 3, 35, *per Belknap*.—A subject might and may unquestionably have this franchise or royal perquisite, 1st, by grant; 2d, by prescription within the shore between the high water and low water-mark, or in a certain distinct *districtus maris*, or in a port, or creek, or arm of the sea; and this may be had in gross, or as appurtenant to an honour, manor, or hundred. *Hale de Jure Maris*, c. 7.]

[5. *Of his Prerogative in Ports and Havens.*

A port, saith my Lord Hale, is *quid aggregatum*, consisting of something that is natural, viz., an access of the sea, whereby ships may conveniently come, safe situation against winds where they may safely lie, and a good shore where they may well unlade: something that is artificial, as keys, and wharfs, and cranes, and warehouses, and houses of common receipt: and something that is civil, viz., privileges and franchises, viz., *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority.

Hale de Portibus Maris, c. 2. *β* See *Bo v. Law Diet.* tit. *Port.g*

To erect a public port originally and *de novo*, is a part of the *jus regale* of the crown of England. And as it is not competent to a subject to institute or erect a common port without the charter of the king, or a lawful prescription, so neither is it competent to a subject without such

(B) As universal Occupant. (*Ports, Havens, &c.*)

charter or prescription to erect a port for the men of such a fee or precinct, as for his own tenants. A lord of a county palatine, though he may have, and usually had, ports by charter or prescription, yet he cannot erect a common port within his palatine jurisdiction. For the concernment of a port must necessarily exceed the extent and limits of the *jura regalia* that are incident to a county palatine; for the safety of the kingdom, the commerce of the kingdom, and the king's revenue are concerned in it. Merchants and seamen of all parts and quarters of the world are let into the kingdom publicly, and under the public protection, in a public port: and, consequently, it is not within the extent of a jurisdiction palatine *de novo* to erect a public port.

Hale de Portibus Maris, c. 3.

In the erecting of a port the royal authority is not restrained, as in the grant of a market, by the vicinity of the new port to a former port. For though the old port may be greatly injured by the erection of the new port in its neighbourhood, yet that circumstance will of itself be no objection to it; provided that the new port be not within the proper limits of the old port, and there be no obstruction to the water or otherwise, but that ships may, if they will, arrive at the former port.

Hale de Portibus Maris, c. 5.

But, 1. It cannot be erected within the peculiar limits by charter or prescription belonging to the former port, because that is part of the interest of the lord of the former port. Neither can the first port be obstructed or wholly defaced, or excluded for arrival of ships, but by act of parliament, as was done in the case of Melcombe translated to Poole. Rot. Parl. 11 H. 6, n. 30. And the reason is, because a public interest is concerned; viz., the interest of the merchant at large, and the interest of the traders and mariners in that particular place or port, who have a right settled in them for the application, lading, and unlading of ships there.

2. If the king have an ancient port at A, and he erect another port hard by, with a general prohibition that no man shall bring his goods or merchandises by sea to any other port within five miles but to that which is newly erected, this prohibition is good, as against the king's interest in the former port, though the new port be erected within the precincts of the old; for he may derogate from his own simple interest by his own restriction. But this restriction is not good against the subjects of the port of A, who by usage had a right to come with their own shipping, and lade and unlade: and this, although the goods might be customable goods; for the inhabitants of A had an easement acquired to themselves by prescription.

3. But if the king erect by his own proclamation a port at A where there was no arrival of ships before, and doth not grant it to another person, but keeps the interest in himself of this franchise; there, it seems, the king may dissolve this port, or erect another port, with a prohibition that no ship shall arrive within such a distance, but at the new port; for there was no right of arrivage of any ships at the former harbour lodged in the inhabitants nor any other subject, but only permissive at the king's pleasure, and he may derogate from his own right.

4. But if a subject hath a port and arrival of ships at B by prescription or charter, and afterwards the king erect a new port, within three or five miles within or without the precincts of the port of B, with a prohibition that no ships shall arrive within five miles of the new-erected port else-

(B) As universal Occupant. (*Ports, Havens, &c.*)

where; this prohibition or restriction is void, as against the interest of the owner of the port of B, or the inhabitants of B, because there was a former interest lodged in the owner and inhabitants of the port of B, which cannot be taken from them without their own consent, or by act of parliament.

5. But if a subject, or the king's fee-farmer, hath a port at R by prescription or charter, and the king grants that no ships shall arrive within five miles, or such like compass, the king cannot within that precinct erect *de novo* a port to the prejudice of that port to which he had precedently granted this privilege. For the grant is good as against the king, and any interest derived from him after this grant: and although, as hath been said, without this restrictive clause, the king might have erected a port near to the former, which would have had this concurrent power or franchise, yet the king hath bound up his hands by his own charter; and by this inhibition, the precinct, to which this inhibition extends, is become as it were parcel of the precinct of the port.

The right in ports, according to Lord Hale, is threefold:—The *jus privatum*, or the interest of propriety or franchise. The *jus publicum*, or the common interest that all persons have to resort to or from public ports, as public sea marts or markets, with their goods, wares, and merchandises. (a) The *jus regium*, or the right of superintendency and prerogative, which the king hath for the safety of the realm, or benefit of commerce, or security of his customs. The first, viz., the *jus privatum*, divides itself into the ownership of propriety, and the ownership of franchise. The ownership of propriety is, where the king, or a common person by charter or prescription, is the owner of the soil of a creek or haven, where ships may safely arrive and come to the shore. This interest of propriety is *prima facie* in the king, but may belong to a subject. But the subject hath not thereby the franchise of a port, nor may he so use or employ it, unless he hath had that liberty time out of mind, or by royal charter. Indeed he may bring thither for his own private use his own boats and vessels to carry off and bring in his own goods that are not customable, as fish, &c.; but he may not use it as a public port or admit foreigners, unless in case of necessity, nor take toll or anchorage there; for that is finable, either by presentment, or in a *quo warranto*.—The ownership of franchise is that which gives the formality or denomination of a public or lawful port, and becomes a free arrival of ships to lade and unlade their merchandises, and this may be acquired by prescription, or by creation by the king either by proclamation or by charter.

Hale De Portibus Maris, c. 6. ||(a) See *Earl of Lonsdale v. Nelson*, 2 Barn. & C. 382.||

Before any port is legally settled, although the propriety of the soil of a creek or harbour may belong to a subject or a private person, yet the king hath his *jus regium* in that creek or harbour; and there is also a common liberty for any one to come thither with boats and vessels as against all but the king. And upon this account, though A may have the propriety of a creek or harbour or navigable river, yet the king may grant there the liberty of a port to B, and so the interest of propriety and the interest of franchise several and divided. And in this no injury is at all done to A, for he hath what he had before, viz., the interest of the soil, and, consequently, the improvement of the shore, and the liberty of fishing: and as the creek was free for any one to pass in it against

(B) As universal Occupant. (*Ports, Havens, &c.*)

all but the king, for it was *publici juris* as to that matter before, so now the king takes off that restraint, and by his license and charter makes it free for all to come and unlade. (a)

||(a) The public have a right to use the cranes on public quays in a port, on paying a reasonable compensation to the owner. *Bolt v. Stennett*, 8 Term R. 606.||

But if A hath the *ripa*, or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa*, without his consent, unless custom hath made the liberty thereof free to all, as in many places it is: for that would be a prejudice to the private interest of A, which may not be taken from him without such consent. And therefore in the creation of a new port either by proclamation or charter, it hath been the course to secure the interest of the shore beforehand, for the building of wharfs and quays for the application of merchandise, and for the building of houses. So that it is possible, though not ordinary, that the interest of propriety and the interest of franchise may be divided: but it is usual and best in conjunction.

But, though the dominion either of franchise or propriety be lodged by prescription or charter in a subject, yet it is charged or affected with that *jus publicum* that belongs to all men; and so it is charged or affected with that *jus regium*, or right of prerogative of the king, so far as the same is by law invested in the king. It is only with the *jus regium* that we have to do at present, observing, by the way, that the patronage and protection of all *jura publica* being intrusted by the common law to the king; the care of preventing and reforming public nuisances in ports is left to him, and his courts of justice, the prosecutions for them are in his name, and the fines for the defects or annoyances in them are part of his revenue.

Hale De Portibus Maris, c. 8. Though the question of nuisance be a question of fact, and therefore proper for the cognisance of a jury, yet where the king claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may proceed by information in equity, and have a decree to abate it. Case of the City of Bristol v. Morgan, Trin. 11, Car. 1, cited in Lord Hale's *De Portibus Maris*, p. 81; and Attorney-General v. Richards, Anstr. 603.

The *jus regium*, or prerogative of the king in the ports of the sea, branches itself into three parts, as it relates, first, to the preservation of the safety and peace of the kingdom; second, to the trade and commerce of the kingdom; or, third, to the improvement and due answering of the ships' customs and subsidies arising by merchandise imported or exported. From the first ariseth his power of inhibiting persons to come into the realm, or of inhibiting persons to go out of the realm, of both which see hereafter. (C. 3, 4.) From the second ariseth the power claimed by him of opening or shutting the ports in reference to goods exported or imported, of which we shall treat under this division of the subject. With respect to his power in the last, it will be treated of under title "SMUGGLING."

§ Congress have the exclusive right to regulate commerce, and this extends to every species of commercial intercourse between the United States and foreign nations, and among the several states, and any law of a state in collision with the act of Congress is void.

Gibbons v. Ogden, 9 Wheat. 1; *Brown v. State of Maryland*, 12 Wheat. 419; *Wilson v. Blackbird Creek Co.*, 2 Peters, 245.

But state inspection laws, health laws, and laws for regulating the in-

(B) As universal Occupant. (*Ports, Havens, &c.*)

ternal commerce of a state, and those which respect turnpike roads, ferries, &c., are not within the power granted to Congress.

Gibbons v. Ogden, 9 Wheat. 1; Brown v. Maryland, 12 Wheat. 419; City of New York v. Milne, 11 Peters, 102.*g*

As to his power of opening and shutting the ports in reference to goods exported or imported, we shall transcribe the words of Lord Hale upon this delicate point.

Concerning importation of foreign goods, and the prohibition of the importation of them, we may find *de facto* that such inhibitions have been of two sorts, viz., general inhibitions that such or such merchandises shall not at all be imported, under pain of confiscation or forfeiture; or else they have been inhibitions or restraints *sub modo*; as, namely, they shall be imported only at such ports or in such ships.

First, For general prohibitions of merchandises of any particular kind. These were sometimes made, but very rarely; neither indeed could they be lawful without the help of an act of parliament, because there have been in all times several statutes made for the liberty and encouragement of merchants strangers especially to come into the kingdom and trade, which could not be derogated by a proclamation. Magna Charta, c. 30; 2 E. 3, c. 4; 9 E. 3, c. 1; 14 E. 3, c. 2; 25 E. 3, c. 2, and divers other statutes.

And therefore, if at any time there was such inhibitions by proclamation, they were commonly temporary upon an exigence of state, and not perpetual, nor of any certain continuance. But when there were perpetual or long restraints of this nature, they were always done by parliament. 3 E. 4, c. 4; 1 R. 3, c. 12; 19 H. 7, c. 21, against importation of foreign manufactures therein specified; 4 E. 4, c. 1, against importation of foreign clothes; 5 Eliz. c. 7, against importation of daggers, &c.; 27 H. 6, c. 1, an inhibition of the wares of Brabant and Holland, because they there had made restraint of importation of English cloth; 23 H. 8, c. 7, an inhibition by act of parliament of the importation of French wines between Michaelmas and Candlemas; and very many more of the like kind. And the reason of these interposings of acts of parliament was, because that proclamations proved very ineffectual to that purpose, partly because it was at best doubtful whether they could at all be effectual against so many acts of parliament; but doubtless they could not without an act of parliament induce a forfeiture of the goods so imported, as hath been often resolved; whereof more hereafter. See the resolution of the case of monopolies, 11 Rep. 88, the grant of the sole importation of foreign cards, though prohibited by act of parliament, ruled to be against law, and a monopoly. Much more were the things not prohibited by law to be imported. Vide Peeth's case, Rot. Parl. 50 E. 3.

The only act of parliament that seems to give a countenance to these kinds of inhibitions, is that of 3 Jac. 1, c. 6. The king granted a charter to the merchants, that no Spanish wines should be imported but by them. This act repealed that charter in a great measure, whereby some would infer that the patent was good, since nothing but an act of parliament seemed necessary to repeal it. But the consequence is mistaken. *In majorum cautelam* an act of parliament was used in this case as the most safe and effectual means: but if any man consider those acts of parliament that enact the sea to be open, or the resolutions of court in cases of this

(B) As universal Occupant. (*Ports, Havens, &c.*)

nature, or the very preamble of the act itself, he will easily find that such inhibitions cannot be without an act of parliament.

Secondly, as touching particular restraints; as, for instance, that malmseys shall not be imported, but unto the port of Southampton; such a grant is against law, and was accordingly resolved in the case of Southampton, Trin. 1 Eliz. Rot. 73, cited in Cooke's Comment upon Magna Charta, c. 30, and therefore there was a special act of parliament made, the 5 Eliz., for the making good of that charter; and the like course hath been used to make good those restrictions of foreign trade to particular companies; as, for instance, the Muscovy Company, and some others.

2. Concerning exportation, and how far forth the ports may be shut in reference to goods and merchandises exported, both the *quid facti* and the *quid juris* therein. These prohibitions of exportation were never generally for all goods; for that were to destroy trade, but of some particular goods and merchandises. And those restraints were of two kinds, viz., general restraints, that they should not at all be exported; or special and qualified restraints, that they should not be exported, but in such ships, or at such places. Touching both these briefly: and first, touching the general inhibitions.

It is certain, that inhibitions of this nature were very frequent by proclamation; and when they carried with them the apparent reasonableness and fitness of the inhibition, they were not much disputed. Those inhibitions were for the most part touching such commodities whereby the kingdom might be weakened, or scarcity occasioned, by the exportation: as arms, ammunitions, corn, victuals, gold, silver, horses, timber, thread of yarn or woollen, and sometimes of falcons. Vide Claus. 10 E. 2, m. 13, dorso; Claus. 38 E. 3, m. 29; Claus. 41 E. 3, m. 24, dorso; Claus. 43 E. 3, m. 3, dorso; Claus. 45 E. 3, m. 4, dorso. And sometimes in the proclamation there was annexed a clause of imprisonment of offenders; sometimes the forfeiture of the things imported; sometimes the forfeiture of all their goods and lands. But these clauses of forfeiture were only *in terrorem*; for, as we have before observed, a proclamation barely cannot induce a forfeiture of goods. But yet sometimes the searchers and other officers did seize the goods; and when they had so done, they were compelled to account for the goods so seized in the Exchequer; and the parties, whose goods were so seized, were put to much trouble, before they could have their goods again.^(a) But the most usual way to punish offenders against such proclamations was by fine and imprisonment, for where the king may by law prohibit, the proclamation doth increase the offence. And these proceedings were by information at the king's suit, sometimes in the King's Bench, as H. 1, E. 2, B. R. Rot. 38, against such as exported horses, arms, money, and plate, against the king's proclamation; sometimes in the Exchequer, Communia Trin. 16 E. 3, Rot. Mich.; 19 E. 3, Rot. claus. 64, m. 29, and sometimes *coram concilio*, viz., in Chancery.

^a(a) See act of Congress of 1799, c. 128, s. 68—71. For probable cause to justify a seizure, see *Murray v. The Charming Betsey*, 2 Cranch, 64; *Jennings v. Carson*, 4 Cranch, 2; *Locke v. United States*, 7 Cranch, 339; *The George*, 1 Mason, 24. A final decree of acquittal, in a proceeding *in rem*, without a certificate of probable cause, is conclusive that there was no cause of seizure. *The Apollon*, 9 Wheat. 302. What is probable cause is a question of law where the facts are ascertained. *United States v. Gay*, 2 Gallis. 259; *Munns v. Dupont*, 3 Wash. C. C. 31; *Wood v. The United States*, 16 Peters, 342.^g

(B) As universal Occupant. (*Ports, Havens, &c.*)

β It is a good defence to an action on an embargo bond, that the vessel was driven by stress of weather into a foreign port.

United States v. Hall et al., 6 Cranch, 171; DuRousseau v. The United States, 6 Cranch, 307; United States v. Sloop Active, 7 Cranch, 100.*g*

How far these proclamations might be warrantable by law in these particular cases, I shall not positively determine; only thus far I shall say,

First, That if it were admitted, that in these particular cases of arms, ammunition, victuals, and money, such proclamation might be made, and thereby the offenders might be subject to fine and imprisonment; yet it could not be extended to other things, neither ought or might this inhibition be an engine to gain money for licenses. For if the proclamation had any strength, it was because of the inconveniencies of the exportation of these things. If it were not a public inconveniency, it could not be inhibited barely by proclamation; and if it were a public inconveniency, it might not be licensed for private profit. If it might, the strength of the proclamation would consequently cease.

Secondly, If these proclamations were admitted lawful; yet they could not induce any forfeiture of lands or goods, or of the very goods so exported against that inhibition; because that lies not within the strength of anything but a law.

Thirdly, though possibly in the time of hostility, or public danger, or common scarcity, such prohibitions by proclamation of exportation of victuals and arms, might have a temporary effect and use; yet we may easily guess that they were not effectual for perpetuity, nor indeed sufficient provisions *pro tempore*; for the king and his council thought not fit to rest upon such ineffectual means, but acts of parliament have successively passed for the inhibition of exportation of these very things, with penalties of forfeitures added to them. See 1 E. 4, c. 5, for horses; 1 E. 2, P. M. c. 5, of corn, herrings, butter, cheese, and wood; 25 H. 8, c. 5, of victuals of all sorts; 9 E. 3, c. 1; 19 H. 7, c. 15, of bullion or money. The like might be instanced in divers other things.

Let us now come to particulars, or qualified restraints; and they are of two kinds.

First, The restraints of exportation in any but English bottoms. This hath been attempted to be done by proclamation, as a good expedient for the increase of shipping and mariners, and the encouragement of trade and navigation. Vide inde claus. 41 E. 3, m. 25, of a proclamation to that purpose; but it proved ineffectual, till provision was made for it by acts of parliament, viz., 5 R. 2, c. 3; 6 R. 2, c. 8; 14 R. 2, c. 6; 4 H. 7, c. 10. But because it provoked foreign princes to do the like, it was repealed by the statute 1 Eliz. c. 13, with certain provisions made in the case by that statute and the statutes of 5 Eliz. c. 5, and 13 Eliz. c. 15. But now, by a late act of parliament, 12 Car. 3, intituled, "An act for encouraging of navigation," the use of foreign ships is in a great measure restrained.

And upon the whole matter, it will appear from the several acts of parliament that have been made for the support and increase of trade, and for the keeping of the sea open to foreign and English merchants and merchandise, that there is now no other means for the restraint of exportation or importation of goods and merchandises in times of peace, but only when and where an act of parliament puts any restraint. Several acts of parliament having provided, *que la mere soit overt*, it may not be

(B) As universal Occupant. (*Ports, Havens, &c.*)

regularly shut against the merchandise of English, or foreigners in amity with this crown, unless an act of parliament shut it out, as it hath been done in some particular cases, and may be done in others.

In another place Lord Hale hath these words : "Touching the prohibitions of exportations and importations of commodities.—It is true that by divers grants in parliaments the sea ought to be open for exportation and importation of merchandise. Rot. Parl. 18 E. 3, n. 17; 22 E. 3, n. 8. *Item que passage de leines et d'autres marchandises soient overt sans faire aprestes ouster la custome a les merchaunts, que ont les custumes du roi par un certain, quele aprest turne al profit des dits merchaunts et outrageouse grevance et nuschanee a votre commun.* Resp. *Soit le passage overt, et que chescun poit passer fraunchement, savant au roi se que lui est due.* Yet clerely the kinges of this realme always exercised a power in restraint of the free passage of some commodities of this realme by their own power, as well before as after 22 E. 3. And though complaints were made of it, yet the crown retained the power. Vide 25 E. 3, n. 22; 1 H. 5, n. 41.

Pref. to Harg. Hale's Tracts, v. i. p. xxx.; 18 E. 3, c. 3.

"Some instances of the particulars.

"(1.) For exportation prohibited.

"1. The kinges have usually before the stat. of 1 & 2 P. & M. c. 4, and 13 Eliz. c. 15, prohibited the exportation of corne and graine; because the necessary sustenance of the realme. And this is in effect admitted legal. Rot. Parl. 17 R. 2, n. 39. Upon a petition for a repeal of such a restraint, the answer was, *Le roi le voet a present, proviso que bien lise a son counsel a restrainer le passage quant il semble besoignable.* For such restraints vide claus. 5 E. 3, parte 1, m. 21, dors.; Rot. Parl. 50 E. 3, n. 156.

Vide claus. 41 E. 3, m. 21, dors. B. 15; Claus. 48 E. 3, m. 11, dors. B. 159; Claus. 46 E. 3, m. 21, dors. B. 118; Claus. 47 E. 3, m. 12, dors. B. 127; of wools and woolfels, 49 E. 3, m. 21, dors. B. 170.

"2. The kinges of this realme have usually prohibited the exportation of coigne and bullion before any act to restrain it, because it is the riches and wealth of the realme. Claus. 30 H. 3, m. 11.

"3. The kinges of this realme have usually prohibited the exportation of armes, or such other things as are for the necessary defence or strength of the realme. Vide claus. 10 E. 3, m. 31, dors., a proclamation inhibiting the exportation of boards or timber for ships. Claus. 38 E. 3, m. 29, a prohibition of exportation of horses, falchons, thread, bowes, arrowes, bow-stringes, and arms, and to arrest the ship and goods. The like prohibition of commerce with enemies.

Claus. 43 E. 3, m. 3, dors. B. 50.

"4. The kinges have usually restrained the passage of customable goods to some particular ports for the better preventinge of defrauding of customes, and at these ports the cockets kept. Thus did E. 8, claus. 5 E. 5, parte 1, m. 12, dors.

Now settled by the act of 1 Eliz. c. 11.

"And in these cases prohibitions of this nature were legall, and for the most part the cohercion was by stay of the ship or goods prohibited; for no proclamation could induce a forfeiture; and for that cause most of these things were provided for by act of parliament, which subjected the party to a forfeiture or other penalty.

Vide the penalty for breaking such an arrest, claus. 46 E. 3, m. 28, B. 110.

(B) As universal Occupant. (*Beacons and Light-Houses.*)

“(2.) Now for an instance of a restraint of foren trade or importation.—Upon this the acts of Magna Carta, c. 30, 9 E. 3, c. 1, 25 E. 3, stat. 4, 2 R. 2, c. 1, lye heavy; and it hath been seldom practised. Vide a restraint of foren trade in Ireland, 3 R. 2, n. 44.”

“Thus much for the kinge’s power of shutting the ports; which, though it was sometymes useful and profitable for the kingdom, yet oftentimes was made a meanes of great damage and oppression, which did arise by lettinge loose the restraint to particular men for profit.

“And so ariseth the next consideration of the kinge’s power of openinge the ports.

“The kinge might open the passage, which either by his own proclamation he had restrained, or which by act of parliament were restrained, either in respect of this or that particular commodity; as when exportation of some particular wares were restrained in respect of the place, as the transportation of wools to the staple. This is cleere and without question, whereof before. These licences were also complained of, and often enacted against, but could never be remedied. Vide 21 R. 2, n. 82, and the procurers of such licences punished. 51 E. 3, n. 17. Vide 27 H. 6, n. 29; 9 H. 6, n. 37.”

Vide claus. 46 E. 3, m. 22, dors. B. 118.]

|| The king has also the common law prerogative of granting licenses to trade with an enemy in time of war, which without such license is illegal; but he cannot grant such licenses in contravention of the navigation laws.

1 East, 486; 8 East, 273; 12 East, 296; 16 East, 197; 4 Rob. Ad. R. 11; 2 Ibid. 162.||

β Sailing under the license or passport of an enemy in furtherance of his views and interests, subjects the ship and cargo to confiscation as prize of war.

The Julia, 8 Cranch, 181; The Aurora, 8 Cranch, 203; The Hiram, 1 Wheat. 440; The Caledonia, 4 Wheat. 100; The Ariadne, 2 Wheat. 143. See the case of The George, 1 Mason, 24; and The Saunders, 2 Gallis. 210.g

6. Of his Prerogatives in Beacons and Light-Houses.

It is clearly agreed, that the king only has a prerogative in beacons and light-houses; (a) and that he may erect any such, and in such places as will be most convenient for the safety and preservation of ships, mariners, and navigation. Also, it seems to be the better opinion, that this being for the public utility, and one of the prerogatives which he is intrusted with for the safety of the whole realm, he may erect such beacon, &c., as well in the soil or ground of a subject as in that of the crown; and that he may do this without the subject’s consent.

4 Inst. 148; 12 Co. 13; Carter, 90; 2 Keb. 114; 3 Inst. 204. (a) Before the reign of E. 3, there were but stacks of wood set upon high places, which were fired when the enemy was descried; but, in his reign, pitch-boxes were instead of these stacks of wood set up; and this is properly a beacon. 4 Inst. 148.

Also, it is clear, that the subject hath not any power to erect any such beacon, &c., without the king’s license and authority for that purpose.

Vide the authorities *supra*, and Carter, 90.

But by the 8 Eliz. it is enacted, “That the master, wardens, and assistants of the Trinity-house of Deptford Strond, shall and may lawfully from time to time at their will and pleasure, and at their costs, make.

(B) As universal Occupant. (*Wreck.*)

erect, and set up such and so many beacons, marks, and (a) signs for the sea, in the sea-shores and upland near the sea-coasts or forelands of the sea only, for sea-marks, as to them shall seem meet; whereby the dangers may be avoided, and the ships the better come to their ports; and all such *beacons*, marks, and signs so by them to be erected, shall be continued, renewed, and maintained from time to time at the costs and charges of the said master, wardens, and assistants."

(a) Resolved by the two Ch. Justices, Attorney and Solicitor-General, that this act extended as well to light-houses in the night, as to beacons, &c., by the day. 4 Inst. 149, in marg. || And it is also extended to vessels appointed to carry lights. 48 G. 3, c. 104, § 61.||

And although by the common law none but the king could erect *beacons*, light-houses, and sea-marks, yet of later times, by letters patent granted to the Lord High Admiral, he hath power to erect *beacons*, sea-marks and signs for the sea; which power is now vested in the Lords of the Admiralty.

Vide tit. *Court of Admiralty.*

And therefore a suit for the profits of the *beaconage* of a rock in the sea near — in Cornwall, may be in the Court of Admiralty; for, as the profits of the beacons belong to the admiral, so the suit for them ought to be in his court; though the rock be the freehold of another and part of his inheritance.

Sid. 158, *Cross v. Liggs.*

β No light-house, beacon, or landmark, shall be built or erected on any site previous to the cession of jurisdiction over the same being made to the United States.

Act of 15 May, 1820, c. 112, s. 7, 3 Story's Laws, 1797.g

It hath been resolved, that an order or decree for raising a tax for repairing a *beacon*, without setting forth that it was in decay or out of repair, is good, in that it would be dangerous to wait until it became in decay: for the consequence would be, that there would be no *beacon* in the mean time and during the reparation: besides, that it cannot be presumed, that the parties who contribute to the tax will tax themselves unnecessarily.

Raym. 448, The case of the town of Winchelsea.

7. Of his Prerogative in *Wreck.*

By the common law (b) the king hath an undoubted right to wrecks; and his prerogative herein is founded on the dominion he has over the seas; and being sovereign thereof, and protector of ships and mariners, he is entitled to the derelict goods of the merchant; which is the more reasonable, as it is a means of preventing the barbarous custom of destroying persons who in shipwrecks approach the shore, by removing the temptations to inhumanity.

Cro. Jur. Belli, 117, 132, 141; 2 Inst. 167; Molloy, 237; Moor. 224. || 1 Black. Com. 290. || [(b) Declared by stat. *de prerogativa regis*, 17 E. 2, c. 11. King Richard the First, in the second year of his reign, released wreck through all England, as Spelman in his Glossary, title *Wreck*, cites it out of Hoveden. But his successors resumed the prerogative, and that before the above statute of 17 E. 2; and frequent instances thereof are long before that statute in the times of Edward the Fourth, Henry the Third, and King John, Hale De Jure Maris, c. 7, p. 40.]

There are four sorts of shipwrecked goods, *flotsam*, *jetsam*, *ligam*, and *wreck*.

(B) As universal Occupant. (*Wreck.*)

Flotsam, is when the ship is split, and the goods float upon the water between high and low water-mark.

Jetsam, is when the ship is in danger to be drowned, and for saving the ship the goods are cast into the sea.

Ligam, *lagan*, or *ligan*, is when the heavy goods are cast into the sea with a buoy, that the mariners may know where to retake them.

Wreck, is where the goods shipwrecked are cast upon the land.

The *flotsam*, *jetsam*, and *ligan*, in shipwrecks belong to the king as well as the *wreck*; for when the mariners are cast away, there is the same reason that the prerogative should take place in these goods as in the *wreck*.

5 Co. 106.

But, though the king hath a prerogative herein, yet *wreck* may be in a subject by grant or prescription: but, if the subject prescribes in *wreck* alone, he shall not have *flotsam*, *jetsam*, or *ligan*; for the king's grant shall not be taken to be more extensive than the natural import of the words will bear.

5 Co. 107.

β *Wreck* is not such in legal acceptation until it comes ashore and is within the land jurisdiction. When found below low water-mark, it is to be deemed on the high seas, and belongs to the admiralty; so, if it be floating between high and low water-mark, but otherwise, if it becomes fixed on the land although water may be around it.

Reg. v. Two casks of Tallow, 3 Hagg. 294.

A grant by the crown of "wreck of the sea" to the lord of a manor, held not to convey such wreck as *jetsam*, &c.

Reg. v. Forty casks of Brandy, Ibid. 257.g

Goods are said to be wrecked at common law, when there are no marks or signs of their property whereby to prove an owner; which anciently, and before the methods of trading were well known, was very difficult to do; unless some living animal escaped to the shore, whereby they might take the tokens of a property. Hence, ancient authors define it to be no wreck, if a dog or a cat escape alive; or, if certain signs were placed on the goods whereby they might be known. And because this prerogative of wreck was abused, to the prejudice of the merchant, the statute Westm. 3 Ed. 1, c. 4, has provided, that if a dog or cat escape alive, (which in these cases they took to be the most certain proofs of property,) that then the sheriff, coroner, or lord of the isle might claim them; and if the owner came and made his claim within a year and a day, he should have his goods, otherwise they remained to the king.

2 Inst. 167; Bract. lib. 3, fol. 120.

The instance of a dog or cat are only for examples; for if any living thing escapes, the claim may be made.

2 Inst. 167.

If the mariners are pursued by enemies, and come ashore and leave the empty floating ship, which comes to land without any person; yet shall they claim the ship when it comes on shore.

2 Inst. 167; Molloy, 239.

The year and the day mentioned in the statute, shall be from the time

(B) As universal Occupant. (*Wreck*.)

of the seizure ; for from the time of seizure there is a notoriety, in order for the party to make his claim.

2 Inst. 168.

But the property is in the king or the lord of the manor, against all but the right owner, from the time that the goods touch land, even before seizure ; for the king's interest herein is different from that of another occupant, who only acquires a right by the seizure ; for he is intrusted with his prerogative in order to prevent any other occupant.

5 Co. 107.

If the owner dies within the year and the day, his executors or administrators may make claim thereto ; because it is not limited by the statute to the owner at the time of the wreck.

2 Inst. 168.

This law extends not only to wreck, but to *flotsam*, *jetsam*, and *ligan* : but the wreck must be claimed by action at (a) common law ; the *flotsam*, &c., by suit in the Admiralty ; because the wreck is on the land, the *flotsam*, &c., in the seas.

5 Co. 107 ; 2 Inst. 167. (a) By the express words of the statute 15 R. 2, c. 3, the Admiralty cannot take cognisance of goods wrecked.

If the suit be commenced before the year and the day, it sufficeth, though the verdict be not given ; for the delay of the law must do no man an injury.

5 Co. 108.

If wreck be embezzled both from the king and the owner, this may be inquired into on a commission of *oyer* and *terminer*, and the party fined.

2 Inst. 168.

If a lord of the manor take the king's goods as wreck, the king may claim them after the year and the day ; because the king being perpetually employed in the business of the public, cannot be bound to a time.

2 Inst. 168.

If goods wrecked be *bona peritura*, the king or lord may sell them before the year and the day be past ; for the statute shall not be understood to restrain them to keep these things that of their own nature cannot be kept.

If wreck be granted to the lord of the manor, and he take *flotsam*, and wreck, and the jury find this whole matter, and assess entire damages, judgment shall be given against the plaintiff ; for the court will not give their judgment, when for part of the matter claimed the plaintiff hath no title ; and it being matter of fact, the court cannot apportion the damages.

Co. 107, 108, Sir Henry Constable's case.

β No length of time shall divest the original owner of property found derelict at sea ; it will be restored on payment of salvage, according to circumstances, unless there be proof of an intention to abandon wholly.

Wilkie v. The St. Petrie, B. & Ad. 82. See also Le Esperanza, B. & Ad. 92 ; La Belle Creole, 1 Pet. Ad. Dec. 36 ; 1 Haggard, 383 ; 1 Gallis. 135 ; 1 Mason, 272 ; 10 Wheat. 473.

Where the master and crew left their vessel in a sinking condition, and took to the long-boat, and were picked up by another vessel while in sight of the wreck, the vessel and cargo were considered as derelict.

The Schooner Boston, 1 Sumner, 328 ; 1 Dodson, 46.

(B) As universal Occupant. (*Coins and Mines.*)

In case of goods found derelict, the *general* rule is to allow one half the value to the salvors—but more or less will be allowed according to the particular circumstances.

Sprague v. The Cargo of the Maria, 6 Law Rep. 14; *Johnson et al. v. Certain goods*, 6 Law Rep. 118; and see title "*Salvage.*"*g*

Tonnage is granted to the king for all goods imported into the realm as merchandise, by any merchant whatsoever: certain goods are wrecked, and the question was, Whether they should pay this duty? And resolved by Vaughan, that they should not; 1st, Because they could not be said to be imported; for importation is the bringing in of goods by artificial means, as by ships, &c., with deliberation, in order for some use; therefore these goods casually cast up, cannot be said to be imported. 2dly, They cannot be said to be imported for merchandise, but they are now as goods destined for sale; but they may be reserved to the proprietor. 3dly, They are not brought in by any merchant, for they are presumed to be deserted and derelict, and thence the property changed; and the king having a property in the whole, it is to no purpose to give him a part.

Vaugh. 164 to 172.

β Before any goods, wares, or merchandises, which may be taken from any wreck, shall be admitted to an entry, they shall be appraised in the manner prescribed by the act of 1823, c. 149, s. 21, 3 Story, 1889.

See 1 Robinson, 233; 1 Dodson, 450; 2 Haggard, 438; 1 Gallis. 558.*g*

Originally all wrecks were in the crown, and the king has a right to a way over any man's ground for his wreck; and the same privilege goes to the grantee thereof.

6 Mod. 119, *per cur.*

8. *Of the King's Prerogative in relation to Coins and Mines.*

It is clearly agreed, that by the common law the king hath a prerogative in, and is entitled to, all royal mines of gold and silver, and treasures of gold and silver hid in the earth; and that he is intrusted with the (a) coinage, and making money current; and that he alone can bring the mines and treasures of any conquered country into use, by coining them out into his money. And this prerogative is lodged in the king, as he administers justice to all; and therefore the power and regulation of that which is the (b) common standard and measure of all bartering and commerce is committed to his care.

Dav. 19; 2 Roll. Abr. 166; 5 Co. 114; Co. 146. (a) The legitimation of money, and the giving it its denominated value, is justly reckoned *inter jura majestatis*; and in England it is one special part of the king's prerogative. Hal. Hist. P. C. 188. (b) Money is the common measure of all commerce almost through the world; it consists principally of three parts: 1. The materials whereof it is made; 2. The denomination or extrinsic value; 3. The impression or stamp. Hal. Hist. P. C. 188. —Sir John Davis mentions six things as essentials to the legitimation of coin: 1. Weight; 2. Fineness; 3. Impression; 4. Denomination; 5. Authority of the prince; 6. Proclamation. Davis, 19, in the case of mixed money—which last, viz., the proclamation, is not always necessary to the legitimation, says my Lord C. J. Hale; for the currency of money is a question of fact, and may be proved by the officers of the Mint or their indenture, on an indictment for clipping and counterfeiting the king's coin. Hal. Hist. P. C. 196; 2 Salk. 446, S. P.

Also, this prerogative is given to the king as a necessary consequence

(B) As universal Occupant. (*Coins and Mines.*)

of the power of war and peace; for there can be no wars made without the expense and consumption of treasure.

Plow. 315, frequently called the Sinews of War; Co. Lit. 90 b; 11 Co. 91; 2 Roll. R. 298.

Besides, it was thought, that if any other persons had the power of mines of gold and silver, they might by these immense treasures grow too formidable, and wrest that authority from the king which was deposited in his hands only.

Plow. 316.

The use and necessity of money arose from the nature of trade; but more especially from this, that the several provisions of life are in their own nature perishable, and not to be laid up in specie. This made it necessary that some things should be fixed on to pass as tickets of credit in exchange for those commodities: hence, the thing agreed on must have these qualities. 1st, It must be durable, because otherwise it would not be more easily laid up than the provisions themselves. 2dly, It must be scarce, that a little of it may serve to be carried from place to place, in order to supply men's several occasions. Upon these two accounts gold and silver were pitched on as the two metals most scarce and most durable, and therefore best able to answer both the purposes. If therefore gold and silver be taken up as the measures of all other things, it follows, that the comparison of their value will stand thus: when the labour spent in digging, refining, and importing an ounce of silver, is equal to the labour in sowing, reaping, and threshing a bushel of corn, then is an ounce of silver equal to a bushel of corn; the industry in the acquiring is equal, and, consequently, men's property in them is the same, that is, their values are equal; for, if the corn be more plenty than the silver, then a bushel and a half of corn will possibly be worth an ounce of silver; if, on the other hand, the silver be more plenty than the corn, then, possibly, an ounce and a half of silver will amount to no more than a bushel of corn; and what is done by coining of silver is no more than ascertaining the value of several pieces in order for commerce; as that the crown shall contain an ounce and the like, that the people may not be compelled to use their scale and touchstone on every bargain.

Cotton, 4; Lock of Coin.

The policy in relation to the coin is, that the value remains unalterable; for the standard cannot be varied without manifest injustice; as, suppose a man contracts for ten crowns, which is equal to ten ounces of silver, that suppose equal to ten bushels of corn, and before payment the public standard should alter; for instance, that the crown were lessened to half an ounce, and yet we suppose that the industry in the acquirement is the same in relation to the ounce of silver and the bushel of corn; it then follows that the ten crowns paid in public money will be equal to but five bushels of corn, and, consequently, the man by the public act will lose half the value in which he had a property, by the contract: so, in cases of foreign trade, where the measure of commerce is the intrinsic value of the silver or gold, there can be no variation of such measure without injustice.

Lock of Coin.

And indeed the keeping to the common standard is of that importance, that my Lord Coke seems to be of opinion (a) that the alteration of money in weight or alloy cannot be without an act of parliament; and in this

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grounds his opinion on the statutes of 25 E. 3, c. 13, and 9 H. 5, sess. 2, c. 6, but herein the law seems to be as laid down by my Lord Hale.

2 Inst. 575. [(a) In this opinion Sir W. Blackstone concurs with Lord Coke, 1 Bl. Com. 278.]

1. That at the first institution of any coin within this kingdom, the king, and he alone, sets the weight, the alloy, the denominated value of all coin; and this is done commonly by indenture between the king and the master of the Mint.

Hal. Hist. P. C. 191. β For the standard value of the gold and silver coin of the United States—the alloy and weight of each coin—see act of 1837, c. 370, s. 8, 9, and 10, 4 Story, 2523, 2524.g

2. He may by his proclamation legitimate foreign coin, and make it current money of this kingdom according to the value imposed by such proclamation; but the counterfeiting such money was not treason till the statute of 1 Mar. c. 6, made it so; nor the clipping, washing, impairing thereof was not treason till 5 Eliz. c. 11, and 18 Eliz. c. 1; but all these statutes allow the power of legitimization thereof to the king by proclamation.

Hal. Hist. P. C. 192.

β The constitution of the United States gives power to Congress “to coin money, regulate the value thereof, and of foreign coin.”

Art. 1, s. 8.

And this instrument declares, that no state shall “coin money, emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts.”

Art. 1, s. 10. For the value of foreign coin in the United States, see act of Congress of June 28, 1834, 4 Story, 2377; an act of the 3d of March, 1843, ch. 69. For the punishment of counterfeiting of the coin of the United States, or foreign coin made current by law, see act of March 3, 1835, s. 20.g

3. He may enhance the external denomination of any coin already established, by his proclamation; and thus it hath been gradually done almost in all ages.(a) This is sometimes called imbasing of coin, and sometimes enhancing of it; and it is both; it is an enhancing of coin in respect of the extrinsic value or denomination, but an imbasing in respect of the intrinsic value; as for instance, when in the time of Edward the Fourth, a noble was raised to a higher rate by twenty-pence.

Hal. Hist. P. C. 192. (a) Though it be not absolutely an imbasement of the coin in the species, yet it hath very near the same effect. Hal. Hist. P. C. 194.

4. He may by his prerogative imbase the species or material of the coin, and yet keep it up in the same denominated or extrinsic value as before; namely, to mix the species of money with an alloy below the standard.

Hal. Hist. P. C. 192; Dav. 18; 2 Roll. Abr. 166.

As to my Lord Coke's opinion, all he says that can be inferred from it is, that it is not safe nor honourable for the king to debase his coin below sterling; and that if it be at any time done, it is fit to be done by assent of parliament; but certainly all it concludes is that *fieri non debet*, but *factum, valet*.

Hal. Hist. P. C. 194.

From the king's prerogative in coins it hath been adjudged that at common law, and without any statute, an information lay against persons for

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transporting large quantities of money, being against the policy of the state and government.

Hob. 270, Courteen's case and Poph. 149, where it is held, that engrossing a great quantity of money is an offence; and vide Roll. R. 299.

But, though mines of gold and silver belong to the king, yet mines of tin and copper belong to the subject; for by none of the above-mentioned reasons are these to be annexed to the crown.

Plow. 325; 2 Inst. 578; 12 Co. 12. *β* See Bouvier's Law Dictionary, tit. *Mines*, and United States v. Gratiot, 14 Peters, 526; Falmon the lessee v. Alderson, 4 Dowl. P. C. 1; Mees. & Wels. 210, Ibid. 77; Jones v. Shears, 7 Carr. & P. 346; Jones v. Reynolds, 6 Nev. & M. 441; 4 Ad. & Ell. 805; Parrott v. Palmer, 3 Myl. & K. 624; Harris v. Ryding, 5 Mees. & W. 60.*g*

But herein there hath been a great question, viz., Whether, if the mine of copper or tin contained gold or silver, as they often do, whose it should be, the king's or the subject's? And the judges here made a very extended construction, and held, that gold and silver being the nobler and more valuable metals should attract the less valuable, and belong to the king; as likewise for the following reason, that the king's property cannot be held in jointure with the subject, and that the king's property, though ever so small, shall not be lost by mixture with the subject's.

Plow. 323, 328, 336.

But upon this case the reporter very justly observes, that in all base metals of copper, tin, &c., there is a mixture of gold and silver, which mixture is of no value in comparison to the other metal, and the gold or silver is the life of the mine, without which it cannot be worked; so that this was declared all copper and tin mines in the king.

Plow. 339.

And therefore by the statute 1 W. & M. stat. 1, c. 30 § 4, it is enacted "That no mine of copper, tin, iron, or lead, shall be adjudged a royal mine, although gold or silver may be extracted out of the same."

And by the 5 W. & M. c. 6, § 2, "All proprietors of mines wherein any ore shall be found in which there is copper, tin, iron, or lead, shall hold and enjoy the same, notwithstanding that such mines or ores shall be claimed to be royal mines; *provided* that their majesties, and all claiming royal mines under them, may have the ore of such mines, (other than the tin ore in the counties of Devon and Cornwall,) paying to the proprietors within thirty days after the ore is laid on the banks, and before the same is removed, the rates following, viz., for all ore washed wherein is copper, 16*l.* per ton; and for all ore washed wherein there is tin, 40*s.* per ton; and for all ore washed wherein there is iron, 40*s.* per ton; and for all ore washed wherein there is lead, 9*l.* per ton; and in default of payment it shall be lawful for the proprietors to dispose of the ore."

||See the case of Rowe v. Brenton, 8 Barn. & C. 737. || *β* See Revised Statutes of New York, part 1, chap. 9, tit. 11.*g*

The king by express words may grant away royal mines as well as invest a subject with any property in the afore-mentioned chattels, but then it must be by express words; for, if the king grants to J S lands and the mines therein contained, and royal mines are found in them, they shall not pass to the subject; for the king's grant shall not be taken to a double intent, because they are records that ought to have the strictest truth and

(B) As universal Occupant. (*Derelict Goods.*)

certainty; and the most obvious intent is, that they should only pass the common mines that are grantable to a common person.

Plow. 336, and vide *postea*.

It hath been held by the judges assembled at Serjeant's Inn, that the king may enter into any man's ground and dig saltpetre for making gun-powder; and that the king hath a prerogative herein, being necessary for the safety of the realm, although it be a thing of a new invention.

2 Co. 12.

And herein my Lord Coke observes, 1st, That it must be done with as much conveniency and as little to the prejudice of the owner of the ground as possible; and, consequently, that the digging in a man's house, barn, outhouse, &c., or weakening the walls of any such house, &c., is unlawful.

12 Co. 13, 14.

2. That the soil or ground must be made and left as commodious to the owner as it was before.

12 Co. 12.

3. That this is the nature of a purveyance, and an incident inseparable to the crown, and cannot be granted, demised, or transferred over to another.

12 Co. 13.

4. That the owner of the land cannot be restrained from digging and making saltpetre; the king not having an interest in it as he hath in gold and silver in the land of the subject.

12 Co. 14.

9. *Of his Prerogative in derelict Goods; and therein, of Waifs, Strays, and Treasure Trove.*

All derelict goods, and in which no man hath a property, belong to the king as well as derelict lands; so (a) of extra-parochial tithes, though things of an ecclesiastical nature.

Bro. tit. *Prero.* pl. 12; 2 Vent. 267, 268. (a) 5 Co. 18; 2 Inst. 646; ||1 Black. Com. 295. ||—That a person may be guilty of felony in taking goods, the owner whereof is unknown, in which case the king shall have the goods, and the offender shall be indicted for having *bona cujusdam ignoti*. Hawk. P. C. c. 33, § 29.

So, if a person dies intestate and without kindred, his goods and chattels belong to the king. And herein the usual course is said to be for a person to procure the king's letters-patent, and then the ordinary admits the patentee to administration.

Salk. 37, pl. 3.

As to goods waived, these belong to the king, and are in him without any office; because the property is in nobody, and therefore by public agreement is put out of the finder in whom it was by the state of nature, and is vested in the king in recompense for his trouble and charge in the execution of justice.

5 Co. 109.

§ The cases of derelict are those where the goods are voluntarily abandoned by the owner—not those relinquished by force, necessity, or danger, as in cases of wreck—or goods thrown overboard to lighten the ves-

(B) As universal Occupant, (*Derelict Goods*.)

sel; there the right of recovery is not lost, but the goods are recoverable on payment or tender of salvage.

Warder v. Goods saved from La Belle Creole, 1 Pet. Ad. Dec. 36; Bee's Ad. Rep. 82—92; 1 Mason, 372. See 1 Sumner, 328; The Schooner Boston, 1 Sumner, 400, The Ship Henry Ewbank, 6 Law Rep. 14; Sprague v. Cargo of the Schooner Marie, 6 Law Rep. 118; Johnson v. Certain goods, 1 Haggard, 383; 1 Gallis. 135; 1 Mason, 272; 1 Dodson, 46; 2 Haggard, 438; 10 Wheat. 473.*g*

But at the common law, the owner pursuing the felon, and the felon waiving the goods, the owner may retake them. Also upon an appeal of felony the owner is entitled to a writ of restitution; and as a farther encouragement for the prosecution of felons, by the 21 H. 8, c. 11, it is provided, that if the party come in as evidence on the indictment and attain the felon, he shall have a writ of restitution awarded by the judge of assize.

How far a sale in a market overt alters the property in those cases, vide tit. *Fairs and Markets*, vol. 4. *β*In Pennsylvania, a sale of a horse under the act relating to Strays, vests the title in the purchaser, although the horse had been stolen from his owner before he was taken as a stray. Patterson v. M'Vay, 7 Watts, 482. But there is no *market overt*. Hosack v. Weaver, 1 Yeates, 478; Hardy v. Metzgar, 2 Yeates, 347; Easton v. Worthington, 5 Serg. & R. 130; Secky v. M'Dermott, 8 Serg. & R. 500. So in New York, Hoffman v. Carow, 20 Wend. 21; Wheelwright v. Depyster, 1 Johns. 481; Andrews v. District, 14 Wend. 31; Mowry v. Walsh, 8 Cowen, 238; and see Heacock v. Walker, 1 Tyler, 338; Dame v. Baldwin, 8 Mass. 518.*g*

If a felon in flight waive his own goods, and the king seize them, these also are waifs; for they are relinquished, and the property is in nobody.

Bro. *Estray*, (9) 29 E. 3, 19.

In trover the defendant pleads in bar that the queen was seised of the manor of Newport Pagnel, and that in the said manor the goods were found waived, and doth not say that they were waived in flight; this is no bar; for if the goods were only laid upon the manor, and not waived in the pursuit, they are no such waived or derelict goods as the king may claim by his prerogative.

5 Co. 109; Cro. Eliz. 69, Foxley's case.

The owner may at any time retake the goods waived, if they are not seized by the king or lord of the manor; for the lord's property begins from the seizure; for since there is no property altered by the wrong and theft of the felon, and it follows that the right remains till they are seized for the king as a guardian of the public safety, upon the pursuit, or forfeited to him upon the conviction.

21 E. 4, 16; Kitchen, 82.

β The property of the owner is not divested by a piratical capture of the goods.

Munro v. Almeida, 10 Wheat. 473; The Helen, 1 Haggard, 142.*g*

Waifs and strays are not necessarily incident to a leet, but they may be appurtenant to it by grant from the king; for the original prerogative is in the crown, and comes from thence to the subject at the pleasure of the king.

8 H. 7, 1, Bro. *Estray*, 15.

And though a lord of a private manor may have waifs and strays by prescription, yet he cannot have *bona felonum* and *fugitivorum* without grant from the king; because no man can prescribe for them, for every prescription must be immemorial, and the goods of felons and fugitives

(B) As universal Occupant. (*Derelict Goods*.)

cannot be forfeited without record, which presupposes the memory of that continuance.

Bro. *Estray*, 13; 5 Co. 109; 43 E. 3, 16.

The king may grant the privilege of strays to the lord of a manor, or he may claim it by prescription, which supposeth a grant lost; but no lord of a manor can take the king's beasts as strays, because the grant of the king must be supposed to extend no further than this particular prerogative of the king, that is to take the cattle of common persons.

44 E. 3, 19; 5 Co. 105; Kitchen, 82.

Where the lord of a manor hath not a grant or prescription for stray, there the sheriff shall seize it in behalf of the king, and shall account for it to the king in the Exchequer.

24 H. 6, 5; Bro. tit. *Estray*, 5.

If A be seised of a manor whereunto the franchises of waif and stray be appendant, and the king purchase the manor with the appurtenances, the royal franchises are reunited to the crown, and not appendant; because the stray belongs to the king by his prerogative, and when the manor comes to him, the strays are in him *jure coronæ*; but, if he grant the manor in as ample a manner as A had it, this grants the strays by reference to the former grant.

Co. Lit. 121 b.

In the case of the king, if a man justifies, as beasts taken in behalf of the king, yet he must say that the beasts were taken and proclaimed; for otherwise the king's mere seizure shall not be a sufficient presumption in behalf of his property.

29 E. 3, 3; Bro. tit. *Estray*, (4.)

§ In case of a known owner of cattle found trespassing on the land of another, it is the duty of the injured party to give notice to the owner, if he can be found, otherwise he forfeits all claim to damages.

Vandamager v. Wood, 1 Ashmead, 203.

When a person takes an estray to keep for the owner, but neglects to pursue the course prescribed by the statute, he is not liable to an action of trover, unless he uses the estray, or refuses to give it up on demand.

Henry v. Richardson, 7 Watts, 557; Nelson v. Merriam, 4 Pick. 249; and see Palmer v. Ward, 12 Johns. 186; Amory v. Flinn, 10 Johns. 102; Stevens v. Curtis, 18 Pick. 227; Barrett v. Lightfoot, 1 Munroe, 241.g

The sheriff or bailiff of the king cannot pray in aid of the king in an action of trespass brought against him; for the aid of the king cannot be demanded to come in to justify the acts of his ministers, but they are answerable for their own acts; and the taking any chattels is only a fact of the king's ministers; but in matters of titles of land which are no fact of the king's ministers, but relate to his permanent revenue, the particular tenant shall pray in aid of the reversion.

Bro. *Estray* (5); 24 H. 6, 5; Cro. Eliz. 694.

Also, the pleading of the officer is not good, unless he says he hath answered the value of them to the king; for the officer cannot justify the taking in his own right.

Cro. Eliz. 694.

The king or lord of the manor hath property from the time of the stray's coming upon the manor against all others but the right owner;

(B) As universal Occupant. (*Fines and Forfeitures.*)

but, in relation to the right owner, he hath only the custody, and not the property.

Yelv. 96.

The king hath a prerogative in treasure trove, that is, treasures of gold and silver, which must be hid in the earth, and in which no man hath a property; but treasures of gold and silver found on the surface of the earth, or found on the sea, belong to the finder.

3 Inst. 133; Kitch. 80; || Bract. l. 3, c. 3; 1 Black. Com. 296.||

This prerogative was thought to be of that consequence to the crown, that it is said, that anciently the concealing of treasure trove was punished with death; but it is now only punishable with fine and imprisonment.

3 Inst. 133; Hal. Hist. P. C. 506.

10. Of his Prerogative in Fines and Forfeitures.

Fines and forfeitures for offences at law go to the king as the head of the government; and are given to him as well for the public good as for the increase of his revenue.

2 Vent. 268. Vide tit. *Forfeiture*, vol. 4.

Hence it is held, that if a person be attainted of high treason, all his lands, of whomsoever holden, are forfeited to the king, and that though the lands are immediately held of the king, yet he hath them not as royal escheats, but *jure coronæ*, or *prærogativæ regalis*.

Hal. Hist. P. C. 253.

|| And by attainder all personal property, and rights of action in respect of property, accruing to a party attainted, either before or after attainder, are vested in the crown, without office found.

Bullock v. Dodds, 2 Barn. & A. 258.||

§No bill of attainder or *ex post facto* law shall be passed.

Const. U. S. art. 1, s. 9.

No state shall pass a bill of attainder or *ex post facto* law.

Const. U. S. art. 1, s. 10.

Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

Const. U. S. art. 3, s. 3. See act of congress April 30, 1790, c. 36, s. 24; 1 Story, Laws U. S. 88; 4 Mason, R. 174; 2 Johns. Cas. 236; 8 Johns. 520.

A party who claims land against an attainder, the correctness of which he denies, could not on the principles of the common law controvert the title of the purchaser under the attainder in a collateral action; but must reverse the attainder and obtain a judgment of restitution.

Hylton, Lessee v. Brown, 1 Wash. C. C. 344. For the authority of a state to confiscate, see 1 Wash. C. C. 307. See also Cuninghame v. Commonwealth, 3 Yeates, 471; Maclay v. Work, 5 Binney, 154; Dietrick v. Mateer, 10 S. & R. 151; Jackson, Lessee v. Murson, 1 Johns. 277; Slight v. Kane, 2 Johns. 236; Fire Department v. Kipp, 10 Wendell, 266; Beach v. Woodhull; 1 Pet. C. C. R. 2.g

Also, where a statute giveth a forfeiture, either for nonfeasance or misfeasance, the king shall have it, unless it be otherwise particularly directed by the statute.

Moor. 238; 7 Co. 36; 11 Co. 68.

And on this foundation it hath been adjudged, that an archdeacon having

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sold the office of registrar of the archdeaconry, which is a forfeiture within the statute 5 & 6 E. 6, c. 16, the right of nomination belonged to the crown, and not to the bishop of the diocese.

2 Vent. 267, Woodward v. Fox.

Vide *plus* titles "FORFEITURE" and "OUTLAWRY."

(C) Of his Prerogative over the Persons of his Subjects: And herein,

1. *Who shall be said his Subjects.*

ALL persons born in any part of the king's dominions and within his protection are his subjects, as are all those born in Ireland, Scotland, Wales, the king's plantations, or on the English seas; who by their births owe such an inseparable allegiance to the king that they cannot by any act of theirs renounce or transfer their subjection to any foreign prince.

7 Co. 1, &c., Calvin's case; Molloy, 370; Co. Litt. 129; Dyer, 300. Vide tit. *Aliens*, vol. i.

|| By the common law all persons born out of the king's ligeance were aliens; but, by the effect of several statutes, children born out of the king's ligeance, whose fathers, or grandfathers by the father's side, were natural born subjects, at the birth of such children, are now deemed to be natural born subjects themselves, to all intents and purposes, unless their said ancestors were attainted or banished beyond seas for high treason, or were, at the birth of such children, in the service of a prince at enmity with Great Britain.

7 Ann. c. 5; 4 G. 2, c. 21; 13 G. 3, c. 21.

But these statutes only apply to male ancestors, and therefore the children of a natural born female British subject, and of an alien father, are, if born out of the king's allegiance, aliens; and such children cannot inherit their mother's lands in England.

Duroure v. Jones, 4 Term R. 300. *β* See Shanks v. Dupont, 3 Pet. 242; Harp. Eq. 5.g

Two cases have arisen as to the effect of the above statutes on children born in America since the separation of that country from Great Britain; the question being, Whether the parents of such children were "natural born subjects" of the king, so as to render the children subjects under the operation of the 4 G. 2, c. 21?

In one case it was decided, that children born in America since the recognition of the independence of the colonies, of parents born there before that time, and continuing to reside there afterwards, were aliens, and could not inherit lands in England. Their parents were held to have put off their allegiance to the king of Great Britain by *remaining* in America after the recognition of its independence as a state.

Doe v. Acklam, 2 Barn. & C. 779. *β* See Den v. Brown, 2 Halst. 305; Commonwealth v. Bristow, 6 Call. 60; Hollingsworth v. Duane, Wallace, 51; Dawson v. Godfrey, 4 Cranch, 321; Jackson v. Wright, 4 Johns. 75; Hebron v. Colchester, 5 Day, 169; Kilham v. Ward, 2 Mass. 236; Palmer v. Downer, 2 Mass. 179, n.; Phipp's case, 2 Pick. 394, n.; Cunningham v. Springfield, 2 Pick. 394; Inglis v. Sailors' Snug Harbour, 3 Pet. 125; Shanks v. Dupont, 3 Pet. 242; Clifton v. Haynes' Exec., Desaus. 330; Harp. Eq. 5; Wilson v. Marryatt, 8 D. & E. 31; Reese v. Waters, 4 Watts & S. 145. See tit. *Aliens.g*

But, in a subsequent case, where the parent expressly adhered to the British government on the separation of the colonies, and left America, and afterwards went back to America in the service of Great Britain after the recognition of independence, and his children were born after his re-

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turn to America, the children were held British subjects within the 4 G. 2, c. 21, and that it was exactly the same as if the father had gone to reside in any other foreign country before the birth of his children.

Auchmuty v. Mulcaster, 5 Barn. & C. 772. || *β Shanks v. Dupont*, 3 Pet. 242; 8 D. & R. 593; *Ibid.* 185.*g*

Also, the subjects of a foreign prince, coming into England and living under the protection of our king, may, in respect of that local ligeance which they owe to him, be guilty of high treason, and indicted that they *contra dominum regem* (the words *naturalem dominum suam* being omitted) did compass, &c., *contra ligeantie sue debitum*. And it is said, that even an ambassador, committing a treason against the king's life, may be condemned and executed here, and that for other treasons he shall be sent home.

3 Inst. 4, 5; *Dyer*, 145; *Hob.* 271; 2 *Salk.* 630, pl. 2; *Hawk. P. C. c.* 17, § 5; *Hal. Hist. P. C.* 59. || *Vide tit. Ambassador.* ||

But aliens who in a hostile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themselves or in company with English traitors, cannot be punished as traitors, but shall be dealt with by martial law.

Hawk. P. C. c. 17, § 6.

If the king of England makes a new conquest of any country, the persons there born are his subjects; for by saving the lives of the people conquered he gains a right and property in such people, and may impose on them what law he pleases.

Dyer, 224; *Vaugh.* 281. {See *Cowp.* 204, *Campbell v. Hall.*} *β* The allegiance formerly due by the people of this country to the king of England, was transferred to the government of their own country on the happening of the Revolution. *Ainslie v. Martin*, 9 *Mass.* 461; *McIlvaine v. Coxe*, 4 *Cranch*, 209. Allegiance may be dissolved by the mutual consent of the government and its subjects. *Inglis v. Sailors' Snug Harbour*, 3 *Pet.* 125; *United States v. Parcheman*, 7 *Pet.* 51.*g*

But until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent; (a) for in all such cases the laws of the conquering country shall prevail.

2 *P. Wms.* 75, 76; {4 *Burr.* 2500, *Rex v. Vaughan.*} (a) That where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity. 2 *Salk.* 412.

If there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry their {¹} laws with them; and therefore such new found country is to be governed by the laws of England; though, after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, {²} will not bind them.

2 *P. Wms.* 75; 2 *Salk.* 411, pl. 1; like point, 2 *Ld. Raym.* 1245. {¹} This must be understood with very many and very great restrictions. Colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties,) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. 1 *Bl. Com.* 107; 2 *Wils. Works*, 47, 54; 1 *Tucker's Black. Appendix*, 378, et seq.; 4 *Burr.* 2500. *Rex v. Vaughan*; 1 *Mass. T. Rep.* 59, *Commonwealth v. Leach*; 2 *Mass. T. Rep.* 10, *Amoury*

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v. Gilman; *Ibid.* 534, 535, *Commonwealth v. Knowlton*; 1 *Johns. Ca.* 96, 97, *Jackson v. Dunsbath*; 1 *Dall.* 67, *Morris's Lessee v. Vanderen*; *Ibid.* 74, 75, *Republica v. Mesca et al.*; 2 *Dall.* 394, *United States v. Worrall*; 1 *Swift's System*, 42, 45. {2} 1 *Dall.* 67, *Morris's Lessee v. Vanderen*; 2 *Mass. T. Rep.* 176, *Merry v. Prince*. See 2 *Wils. Works*, 54—63; 3 *Wils. Works*, 199—247.

2. *That he is entitled to the Service and Allegiance of his Subjects; and therein, of the Oaths enjoined them.*

It is clearly agreed, that the king hath an interest in all his subjects, and is entitled to their services, and may employ them in such offices as the public good and the nature of our constitution require; and on this foundation it hath been held, that the king may oblige a person to serve the office of sheriff, and that no person can be exempt from such office but by act of parliament or letters patent.(a)

Say, 43; *Moor*, 111; 2 *Vent.* 247, 248; 4 *Mod.* 269; *Salk.* 167, pl. 1; *Ld. Raym.* 29; *Skin.* 574, pl. 1; *Carth.* 306. || (a) It should seem, that in every case where a party is called upon to perform a public duty, he is liable to be punished for refusing to perform it. 2 *Maule & S.* 218; 2 *Inst.* 214. || *β* *Vide tit. Privilege, H.g*

The allegiance that is due from every subject to the king is of two kinds: 1st, Original, virtual, and implied: 2dly, Expressed or declared by oaths or promises. The first of these arises from that protection which every subject hath from the king and the laws, and is (b) said to be due to the natural and not to the politic person of the king; and from the breach thereof ariseth the crime of high treason.

7 *Co. Calvin's case*; *Hal. Hist. P. C.* 59, 61. (b) 1 *Vent.* 3. [For the misapplication of their allegiance to the regal capacity or crown, exclusive of the person of the king, (among other things,) were the *Spencers* banished in the reign of *Edward the Second*. *Hal. Hist. P. C.* 67.] That the obligation of allegiance is not to be applied nor laid upon private causes; for no man can make a cause of allegiance other than such as the law makes, and as concerns the faith and loyalty that the subject oweth to his sovereign in points of state. *Hob.* 271, 272.

[Natural allegiance cannot be forfeited, cancelled, or altered by any change of place, time, or circumstances, nor by any thing but the united concurrence of the legislature. For it is a principle of universal law, that the natural born subject of one prince cannot, by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was due. Indeed the natural born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince.

1 *Bl. Com.* 369. Sir M. Foster observes, that "the well-known maxim which the writers of our law have adopted and applied to this case, *nemo potest exuere patriam*, comprehendeth the whole doctrine of natural allegiance." *Fost. Cr. L.* 184. This is exemplified by a strong instance in the report which that learned judge hath given of *Æneas Macdonald's case*. He was a native of Great Britain, but had received his education from his early infancy in France, had spent his riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the French king; acting under that commission, he was taken in arms against the king of England, for which he was indicted and convicted of high treason; but was pardoned upon condition of his leaving the kingdom, and continuing abroad during his life.

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Ibid. 59. β It seems that a citizen of the United States cannot throw off his allegiance to his country, without a law authorizing him to do so. *United States v. Gillies*, Pet. C. C. R. 161; 7 Wheat. 348; *Murray v. Charming Betsey*, 2 Cranch, 120; 2 Murf. 393; 9 Mass. 461; 3 Pet. 122, 160; 4 Am. Law Journ. 361; 7 Wheat. 283; 3 Peters, 246. See 9 Dana, 178; 8 Page, 433. American ante-nati do not owe perpetual allegiance to the British crown; and British subjects, though born before the American revolution, are equally incapable with those born subsequent to that event, of inheriting or transmitting inheritance of lands in this country. *Inglis v. Trustees, &c.*, 3 Pet. 121; and see *Blight's Lessee v. Rochester*, 7 Wheat. 544. g By st. 26 G. 3, c. 60, it is enacted, that no registry of any ship or vessel shall thenceforth be made, until the owner or owners of such ship or vessel shall have taken an oath therein set forth in manner therein directed, containing, among others, the words following: "That I, the said A B, (and the said other owners, *if any*,) am (or are) truly and *bonâ fide* a subject (or subjects) of Great Britain, and that I, the said A B, have not (nor have any of the other owners, to the best of my knowledge and belief) taken an oath of allegiance to any foreign state whatever, except under the terms of some capitulation, (*describing the particulars thereof*)." And by st. 27 G. 3, c. 19, \S 4, reciting the above clause, it is enacted, that any oath which shall have been, or may be taken, for the sole purpose of acquiring the rights of a citizen or burgher in any foreign city or town in Europe to be enjoyed during the time that the person or persons taking such oath shall reside in such city or town, and for a limited time after such residence shall have expired, shall not be deemed an oath of allegiance to a foreign state, within the true intent and meaning of the above act.

The express allegiance, or by oaths and promises, is either by the common law, or by particular acts of parliament. By the common law, besides the oath due by tenure or *ratione feodi*, all persons above the age of twelve years were obliged in the torn or leet to take an oath of fidelity and allegiance, whether such persons held any lands of the king or not; and in all oaths of fealty, as likewise in the profession of homage to any inferior or subordinate lord or prince, it was with a *salvâ fide et ligeantiâ domini regis*, which saving to omit was punishable in such lord.

Spelm. title *Fidelitas*; Co. Lit. 85; Finch of Law, 241; 2 Inst. 147; Hal. Hist. P. C. 64, &c. β A naturalized citizen of this country cannot render himself an alien, by merely taking an oath of allegiance to a foreign nation; he must, at least, also change his domicile. *Fisk v. Stoughton*, 2 Johns. Cas. 407. See *Santissima Trinidad*, 7 Wheat. 348; *Alsbury v. Hawkins*, 9 Dana, 178. g

The particular acts of parliament relating to this matter are the 1 Eliz. c. 1, which enjoins the oath of supremacy; 3 Jac. 1, c. 4, which instituted the oath of obedience; the statutes 7 Jac. 1, c. 2, 6; 13 Car. 2, statute 2, c. 1; 13 & 14 Car. c. 3 & 4; 25 Car. 2, c. 2; 30 Car. 2, stat. 2, c. 1, which are abrogated by 1 W. & M. sess. 1, c. 1 & 8, and new oaths appointed in their room by the 1 W. & M. sess. 2, c. 2 & 3; 3 W. & M. c. 2; 13 W. 3, c. 6; 8 Ann. c. 22; 4 Ann. c. 8; 6 Ann. c. 7, 14, 23; 1 Geo. 1, c. 13; 13 Geo. 1, c. 29; 2 Geo. 2, c. 31; 9 Geo. 2, c. 26; 6 Geo. 3, c. 53.

By the 2 Geo. 2, c. 31, it is enacted, "That all persons that shall be admitted into any office, civil or military, or shall receive any pay by reason of any grant from his majesty, or shall have command or place of trust under his majesty, or by authority derived from him, in England, or in his majesty's navy, or in Jersey or Guernsey; or that shall be admitted into office in the household of his majesty, or of the Prince of Wales, or any other of his majesty's issue; and all ecclesiastical persons, heads and other members of colleges and halls in the universities, that are of the foundation and enjoy any exhibition, being of the age of eighteen years; and all persons teaching or reading to pupils, and all schoolmasters and ushers, and all preachers of separate congregations, high constables, and every

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person who shall act as a serjeant at law, counsellor, barrister, advocate, attorney, solicitor, proctor, clerk, or notary, by practising as such in any court in England, who shall after the 21st of January, 1728, be admitted into any of the above-mentioned preferments, &c., or shall come into any such capacity, &c., shall take the oaths appointed by 1 Geo. 1, c. 13, as by the said statute is directed in the Court of Chancery, King's Bench, Common Pleas, or Exchequer, at any time (a) before the end of the next term after he shall be admitted, &c., or before the end of the next quarter sessions where such person shall reside."

[(a) By the 9 G. 2, c. 26, the time is enlarged to six calendar months after such admittance, &c. And statutes are annually passed for the purpose of enlarging the time and indemnifying those who have omitted to qualify.] ||Vide title *Papists*, as to the old oaths required, and for the act 10 G. 4, for their relief; and see tit. *Offices and Officers*, as to the oaths now required from persons holding municipal and other offices.]]

Persons neglecting to incur the penalties in 1 Geo. 1, c. 13, viz., disability to, &c., or to be guardian or executor, or capable of any legacy or deed of gift; or to be in any office, or to vote at any election for members of parliament, and shall forfeit 500*l*.

3. *That he may restrain his Subjects from going abroad; and therein, of the Writ de Ne exeat Regno.*

By the common law every subject may go out of the kingdom for merchandise or travel, or other cause, as he pleases, without any license for that purpose: this appears from the (b) statute 5 R. 2, c. 2, made to restrain persons passing out of the realm, but except lords, great men, and notable merchants; as also by the statute 26 H. 8, c. 10, which gave power to the king during his life to restrain persons from trading to some certain countries; (c) which acts had been vain and idle, if the king by his prerogative might have done it.

F. N. B. 85; Dyer, 165, 196; 2 Roll. R. 12; 3 Mod. 131; Lit. R. 27; Stile, 442. (b) This statute is repealed by 4 Jac. 1, c. 1. (c) Noy, 182. β No citizen can be sent abroad, or, under the existing laws of the land, prevented from going abroad, except in those cases in which he may be detained by civil process, or upon a criminal charge. 2 Kent, Com. 34.*g*

But, notwithstanding this general freedom and liberty allowed by the common law, it appears plainly that the king by his prerogative, and without any help of an act of parliament, may prohibit his subjects from going out of the realm; but this must be by some express prohibition; as, (d) by laying on embargoes, which can be only done in time of danger, or by writ of *ne exeat regno*, which, from the words *quam plurima nobis et coronæ nostræ prejudicialia ibidem prosequi intendis*, appears to be a state writ, but is never granted universally, but to restrain a particular person, upon oath made that he intends to go out of the realm. Indeed Fitzherbert says, that the king may restrain his subjects by proclamation; and assigns as a reason for it, that the king may not know where to find his subject, so as to direct a writ to him.

12 Co. 33; 11 Co. 92; Fitz. N. B. 89; 2 Inst. 54. One reason, says Sir John Davis, why the king is entitled to customs, is, his permitting his subjects to go beyond sea, when he might restrain them. Dav. 9; 4 Mod. 179. (d) Vide tit. *Merchant*.

It is agreed that the matter alleged in the writ of *ne exeat regno* is not traversable, and that the king may avoid it without showing any cause; and though it may be objected, that if the king may, without assigning any reason, grant it in one case, he may in five hundred, &c., the answer

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is, that this is a royal trust reposed in the king, which the law does not presume that he will abuse or make use of to the prejudice of the subject. Dyer, 179; Moor, 109; 3 Inst. 179; Coomb. 53; Skin. 166.

This writ may be awarded under the privy seal or signet, as well as the great seal.

F. N. B. 85; Lane, 29; 2 Co. 17 b, 76; 11 Co. 92.

The writ of *ne exeat regno*, though a prerogative or state writ, hath been introduced into the Court of Chancery. It was at first but tenderly made use of, but is now become the common process of that court. The plaintiff, by a standing order made in my Lord Cowper's time, is to make oath of his debt, and the writ is always marked for the sum sworn in the affidavit, in words at length and not in figures; and the plaintiff swears {} the defendant is going out of the kingdom, which if he should do, the debt may be lost; the order is till answer or further order; and it was formerly thought, that upon the party's putting in a full answer the writ should be discharged; but of late the party hath been obliged to give security to abide the order on hearing, before the court will discharge the writ; which security is taken by recognisance before a Master, as all other security is, and it is in the penalty of what is sworn due; and the sheriff takes bail accordingly when he arrests the party thereon, the sum sworn due being constantly endorsed on the *ne exeat regno* as a guide for the sheriff to take bail by.

Skin. 13; Chan. Ca. 115; 2 Chan. Ca. 245; 7 Mod. 9; Ld. Raym. 696; Cases in B. R. 562; Stil. 441. 442; {} 5 Ves. J. 96, Russell v. Asby. {} A general affidavit of belief of the defendant's intention to quit the kingdom has been held to be sufficient, without stating the circumstances on which that belief is founded. 5 Ves. J. 96, Russell v. Asby. But see 7 Ves. J. 410, Oldham v. Oldham; Ibid. 417, Etches v. Lance; 8 Ves. J. 597, Amsinck v. Barclay; 11 Ves. J. 54, Hannay v. M'Intire; that there must be a positive affidavit that the defendant is going abroad, or has declared that he is. And then the writ will not be discharged upon the defendant's affidavit denying the intention. 8 Ves. J. 594, Amsinck v. Barclay. It is sufficient if the affidavit states that the debt will be endangered; without alleging that the purpose of going abroad is to avoid the jurisdiction. 7 Ves. J. 417, Etches v. Lance; 8 Ves. J. 32, Tomlinson v. Harrison. {} 1 Kent, Com. 300; 2 Ibid. 34; Lucas v. Hickman, 2 Stew. 11; Mitchell v. Bunch, 2 Paige, 606; Rhodes v. Cousins, 6 Rand. 188; Cox's Ex. v. Scott, 5 Har. & Johns. 384; Basket v. Scott, 5 Lit. Rep. 208.*g*

A writ of *ne exeat regno* may be granted in any case where there is danger of subterfuge from the justice of the nation, though of a private concern.

2 Chan. Ca. 245.

β Writs of *ne exeat* (and of injunction) may be granted by any judge of the Supreme Court in cases where they might be granted by the Supreme or a Circuit Court; but no writ of *ne exeat* shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

Act of March, 1793, s. 5, 1 Story, 341.

The district judges of the courts of the United States have no authority to issue writs of *ne exeat*.

Gernon v. Boccacine, 2 Wash. C. C. R. 130.*g*

{It will not be granted against a defendant who had engaged to give an indemnity to the plaintiff for becoming his surety. To obtain it, there must be an equitable demand in the nature of a debt actually {} due.

- 6 Ves. J. 283, Cock v. Ravie. {} 7 Ves. J. 171, 173.}

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Giving out that he intends to go beyond sea, assigned as a reason for awarding a writ of *ne exeat regno*, and it was granted.

2 Chan. R. 2; {1 Dick. 380, *Taylor v. Leitch.*}

A solicitor's bill being taxed and reported overpaid 60*l.*, on motion and affidavit of his going beyond sea, a *ne exeat regno* was granted, though no bill was in court whereon to ground this writ.(a)

Prec. Chan. 171, *Lloyd v. Cardy.* [(a) But it hath been since determined, that this writ cannot be granted but on bill filed. *Ex parte Brunker*, 3 P. Wms. 312.]

A motion was made for a *ne exeat regno* against Sir Jerom Smithson, for that his wife had sued him in the ecclesiastical court for alimony; and it was suspected that he would go beyond sea to avoid the sentence; and the writ was granted; and the Lord Chancellor said, that it had been so done before, for this court was to aid the ecclesiastical court in such cases.

2 Vent. 345, *Sir Jerom Smithson's case.* [So, *Read v. Read*, 1 Ch. Ca. 715; *Anon.* 2 Atk. 210; *Pearne v. Lisle*, Ambl. 76.] {1 Dick. 143, *Ex parte Whitmore.* But the writ is not granted before a decree for alimony has been obtained; and then it issues only for sums actually due, viz., arrears and costs. 1 Ves. J. 94, *Coglar v. Coglar*; 7 Ves. J. 171, *Shaftoe v. Shaftoe*; *Ibid.* 173, *Dawson v. Dawson.* } || See 14 Ves. 261; 1 Jack. & Walk. 407; 1 Turn. & Russ. 322. || β Where a wife filed a bill against her husband for alimony, &c., and it appeared that he had abandoned her without any support, and threatened to leave the state, on petition of the wife, the court granted a writ of *ne exeat* against him. *Denton v. Denton*, 1 Johns. Ch. R. 364; S. C., *Ibid.* 424. The writ cannot be granted unless prayed for in the bill. *Sharpe v. Taylor*, 11 Sim. Ch. 50.g

It hath been held, that a *ne exeat regno* lies to prevent one from going into Scotland, it being out of the jurisdiction of chancery: and the process thereof not reaching thither, is equally mischievous to the suitor here as if he actually went out of the kingdom: and in this case it is said, that the condition must be not to go out of the realm, or to Scotland; but in (b) a later case it is held, that there is no occasion that the order should be particular as to Scotland; and that even since the *union* the writ in the general form will restrain the party from going into Scotland as well as any of the king's other dominions that are out of the process of this court.

1 P. Wms. 263, pl. 60, *Done's case.* (b) *Hunter v. Maccray*, Ca. temp. Talb. 196; {11 Ves. J. 46.}

{ The writ will not be granted to restrain a member of parliament from Ireland from returning thither.

11 Ves. J. 43, *Bernall v. The Marquis of Donegal.*}

A *ne exeat regno* having been awarded against the defendant, J S, (who was the now petitioner,) became his surety to the sheriff; after answer put in, J S petitions to be discharged, but was denied; then the cause was heard, and 19,000*l.* decreed against the defendant, and he committed for non-payment; and then J S petitions again to be discharged, because being a *manucaptor*, and the party in prison, there can be no danger of his going beyond sea. Lord Keeper: If so, then his surety is in no danger, and would not discharge him.

Prec. Chan. 230, *Le Clea v. Trot.*

[It hath been determined, that this writ shall not issue on a mere legal demand, for which the defendant might have been holden to bail.

Ex parte Brunker, 3 P. Wms. 312; *Anon.* 2 Atk. 410; *Pearne v. Lisle*, Ambl. 76; *Atkinson v. Leonard*, 3 Br. Ch. R. 218; *Parker v. Appleton*, *Ibid.* 427; {4 Ves. J. 577, *De Carriere v. De Calonne*; 10 Ves. J. 164, *Jackson v. Petrie*; 1 Dick. 82, *King*

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v. Smith; Ibid. 154, Broecker v. Hamilton; 2 Dick. 503, *Ex parte* Duncombe.} But from the case of Atkinson v. Leonard, it seems, that it *shall* issue in matters where the courts of law and equity have *concurrent* jurisdiction. || Hannay v. McIntyre, 11 Ves. 54; Jones v. Alephsin, 16 Ves. 470; Jones v. Sampson, 8 Ves. 593, *acc.*; and see Grant v. Grant, 3 Russell, 598. But where the demand is merely legal it will not be granted, although the party could not be held to bail in consequence of privilege. Gardner v. —, 15 Ves. 444; *β* Seymour v. Hazard, 1 Johns. Ch. R. 1; De Rivafinoli v. Corsetti, 4 Paige, 264; Nixon v. Richardson, 4 Desaus. 108; Edwards v. Massy, 1 Hawk. 359. *g* And being in the nature of equitable bail, it will not be granted under circumstances that would not entitle the party to bail at law; therefore, in case of alimony it will only issue for arrears actually due. 14 Ves. 261; 1 Jac. & W. 407. If the party can be held to bail, the writ can only be had in case of matters of account. Ibid. And the writ will not issue for alimony after a decree in the ecclesiastical court, pending an appeal from that decree. 1 Turn. & Russ. 322. ||

Nor shall it issue on a demand which is not certain.

Anon. 1 Atk. 421; Shearman v. Shearman, 3 Br. Ch. R. 370; Anon. 1 Br. Ch. R. 376. || Vide 1 Turn. & Russ. 332; 2 Jac. & Walk. 211. ||

|| And, in a suit for specific performance, the writ shall not issue against the purchaser, unless the court deem it quite clear that there must be a decree for specific performance.

Morris v. McNeil, 2 Russell, 604. ||

In general, the application for it must be supported by an affidavit, swearing positively to the debt: (*α*) but on a bill for an account, it is sufficient for the plaintiff to swear to the balance *as to his belief*.

Rico v. Gualtier, 3 Atk. 501; Anon. 2 Ves. 489; {5 Ves. J. 91, Roddam v. Hetherington; 8 Ves. J. 593, Jones v. Sampson; Ibid. 597, Amsinck v. Barclay; 10 Ves. J. 164, Jackson v. Petrie.} *β*(*α*) Gerner v. Bocaline, 2 Wash. C. C. R. 130; Thorne v. Halsey, 7 Johns. Ch. 189; Mattocks v. Tremaine, 3 Johns. Ch. 75. *g*

|| The writ will not be discharged though it appear to have issued for a sum exceeding what can be sustained; but the amount will be reduced. But where the affidavit of the plaintiff and the answer of the defendant, together, made a strong *primâ facie* case that nothing was due, the writ was discharged with costs.

Grant v. Grant, 3 Russell, 398; Leo v. Lambert, Ibid. 417.

In general the affidavit should be as positive as an affidavit to hold to bail, for information and belief can only be admitted in matters of pure account. And it must be positive as to the intention of the party to leave the kingdom; but it is sufficient to state that the debt will be endangered, without averring that the party's object is to avoid the jurisdiction.

10 Ves. 164; 8 Ves. 33; 11 Ves. 54; 19 Ves. 342; 19 Ves. 313; 7 Ves. 417.

If the party has been before arrested for the same cause at the suit of the plaintiff, the writ will be discharged.

8 Ves. 594; 2 Mer. 472.

On motion by a residuary legatee for a *ne exeat*, on the ground of collusion between an executor and a debtor of a testator, and that the latter was about to quit the country, the Lord Chancellor refused the application, saying, he knew no instance of such an application being granted.

1 Jac. & W. 646.

And a *ne exeat* was refused to restrain an Irish member of parliament from going to Ireland; the Lord Chancellor saying, the original object of the writ was to restrain the subject from going to the king's enemies, and the court had no authority to alter the form of the writ.

11 Ves. 43. ||

(C) Over the Persons of Subjects. (*Privy Seal*.)

Where the demand is against an administrator, &c., the plaintiff should also swear to his belief of assets come to the defendant's hands.

Anon. 2 Ves. 489.

This writ may issue against a feme covert executrix, whose husband is out of the jurisdiction.

Jenningham v. Glass, 3 Atk. 409; Ambl. 62, S. C. and Moor v. Mellish, therein cited. {1 Dick. 107, S. C.; Ibid. 30, Moore v. Meynell.} || The contrary has since been held by Lord Eldon, Pannell v. Taylor, 1 Turner R. 96; but in Moore v. Hudson, Leach, V. C., granted the writs against husband and wife executrix, the plaintiff undertaking not to serve more than one writ. 6 Madd. 218.||

As the real object of the writ, when applied to private concerns, is to compel the defendant to abide the event of the suit, the court always inclines to discharge the writ upon such security being given.

Baker v. Dumaresque, 2 Atk. 66; Jerningham v. Glass, 3 Atk. 409; Ambl. 62, S. C.; Robertson v. Wilkin, Ambl. 177; Atkinson v. Leonard, 3 Br. Ch. R. 218; {1 Dick. 115, Boon v. Collingwood.}

{The plaintiff, having twice held the defendant to bail in actions at law, obtained a writ of *ne exeat regno*, discontinuing his action. The writ was discharged on the principle that a man cannot be arrested and held to bail a second time for the same cause.

8 Ves. J. 594, Amsink v. Barklay.}

Whether the writ shall issue against a foreigner or person usually resident *out* of the jurisdiction, in respect of a demand which originated *abroad*, and is *there* suable, vide Pearne v. Lisle, Robertson v. Wilkie, Atkinson v. Leonard, *ubi supra*.]

|| And see 1 Ves. & B. 129; Beames on *Ne exeat Regno*, 63, 68.|| {And also 4 Ves. J. 577, De Carriere v. De Calonne; 5 Ves. J. 91, Roddam v. Hetherington.}

|| The court is very delicate to apply the writ to foreigners, and it is a necessary term that it be simply a case in equity.

De Carriere v. De Calonne, 4 Ves. 577.

But the circumstance of a party being a foreigner is not alone a ground for discharging the writ.

Flack v. Holm, 1 Jac. W. 416.

And the writ will be granted in respect of a debt contracted in Jamaica, between persons resident there, though in Jamaica the defendant could not have been arrested for the demand.

Grant v. Grant, 3 Russell, 598.||

4. That he may command his Subjects to return Home; and therein, of awarding a *Privy Seal*.

As the king may restrain any of his subjects from going abroad, in like manner it is clearly agreed, that he may command them to return home; and that the disobeying a privy seal to this purpose is the highest contempt. 1st, It is a disobedience to the command of the king himself directed to the party. 2dly, The command is, that he shall return upon his faith and allegiance, which is the strongest compulsion that can be used. 3dly, The thing required by the king is the principal duty of a subject, viz., to be at the service of his king and country.

Dyer, 128 b; Lane, 44; Moor, 109; 3 Inst. 179.

The punishment for this offence is, the seizing the party's estate (*a*) till he return; and of this there are divers instances in our books.

(*a*) And when he does return he shall be fined. Hawk. P. C. c. 22, § 4.

(C) Over the Persons of Subjects. (*Privy Seal.*)

As that of William de Brittain in the 19th year of Edward the Second, who refusing to return upon the king's writ, his goods and chattels, lands and tenements, were thereupon seized into the king's hands: and the like was done in the case of Edward of Woodstock, (a) Earl of Kent, in the same reign.

Dyer, 128 b. Vouched in a case there. Lan. 44, S. C. cited and said to be proved by other precedents. (a) Leon. 10, cited.

So in the case of one Bartue who married the Duchess of Suffolk, they obtained a license from Queen Mary to go out of the realm, under pretence of recovering some debts they were entitled unto as executors to the duke; when in reality it was on account of the religion established by Queen Mary, and living with other fugitives under the protection of the Palsgrave of the Rhine in Germany, who was an eminent Calvinist, were sent to by privy seal; but the messenger in endeavouring to serve them with his letters, being obstructed, beat and abused by their servants and attendants, a certificate was made of this, and their lands and tenements seized.

Dyer, 176; Jenk. Cent. 220, Bartue's case.

So in the case of Sir Francis Englefield, who departed the kingdom on a license obtained for three years; but not returning at the expiration of the three years, a privy seal was sent to him by Queen Eliz., which he not obeying, and this matter being certified into Chancery by the queen under her sign manual, in the fifth year of her reign by virtue of a commission under the great seal directed to Sir Henry Nevil and others, his lands and tenements were seized.

Leon. 9; Moor, 109; Dyer, 375; Ann. 95, S. C., Sir Francis Englefield's case. Vide also 7 Co. 18; Poph. 18; 4 Leon. 135.

So in the case of Sir Robert Dudley, who, intending to travel, obtained a license from King James the First to go to Venice; but, before his departure, he by indenture enrolled for valuable consideration, as was expressed in the deed, (but none paid,) conveyed the manor of Killingworth, with other lands, to the Earl of Nottingham and others in fee, with a proviso, that upon tender of an angel of gold all should be void; and with a covenant on the part of the bargainees, that they should make all such estates as the said Sir Robert should appoint: the bargainees were not parties to the deed; nor had they notice of it until some time after; but afterwards they made a lease to Sir Robert Lee, to the intent that Lady Dudley should take the profits of part of the premises for ten years, if their estate continued so long unrevoked. The king, hearing that Sir Robert had been guilty of some bad practices beyond seas, in the fifth year of his reign sent his privy seal to him, which he not obeying, the great question in this case was, whether those lands thus conveyed were forfeited? And adjudged that they were, the conveyance being fraudulent as to the king.

Lane, 42, &c. The King v. Earl of Nottingham, Pasch. 7 Jac. 1, in *Scac.*

In these cases it hath been held, that the king hath only an interest in the offender's lands till he return; and (b) that his restoring of them to him is not a matter of grace but of right.

(b) Lane, 48, per *Tanfield*, Ch. Baron.

But though the lands are to be restored to the offender, yet it is held, that till his return the king hath a greater interest than the perception of the profits; and that he may assign or grant them, *quamdiu in manibus suis*

(D) The King the Fountain of Justice. (*Jurisdiction.*)

fore contigerint; and that he or his patentee are entitled to woodfalls, may make leases, and grant copyholds, being *domini pro tempore*.

Sav. 7, 8; Leon. 9; Dyer, 176, in marg.; Moor, 112.

And on this foundation it was holden, in Sir Francis Englefield's case, that where Queen Elizabeth, in the eighth year of her reign, and after the forfeiture of Sir Francis, granted a manor, part of Sir Francis's estate, with all the profits, *quandiu in manibus nostris fore contigerit*; and afterwards the acts 13 Eliz. c. 3, and 14 Eliz. c. 6, were made for vesting the estates of fugitives in the crown; after which the queen made a second seizure of those lands, and by her letters patent appointed a steward, who held a court, took surrenders, and granted admittances in right of the queen; yet it was resolved, that this second seizure, by virtue of these acts, gave the queen no greater estate or interest than she had before by the common law; consequently, that the first grant was good, and the courts holden, surrenders and admittances by her steward were void.

Moor, 109; Dyer, 375.

The regular course in those cases is for the messenger to certify his proceedings into Chancery, of which, by *mittimus*, a certificate is sent into the Exchequer, out of which court a commission issues to inquire, &c., and seize the lands of the delinquent; and it is said, that this certificate admits of no traverse, because no venue can be laid here for its trial, the matter being transacted beyond sea: but it is said, that the (a) messenger ought to make oath of the service of the writ of privy seal.

Dyer, 176; And. 95. (a) The writ ought to be served by some messenger, who upon his oath is to make a certificate of it in Chancery. 3 Inst. 180.

And it is said, that there is no need of a date to the privy seal; for that the matter therein contained is not traversable, nor is it returned as other writs are, but the king who issues it is to receive the message or answer of the party, and he is the judge of the contempt.

Leon. 9.

The contempt incurs from the very time notice is given the party; for the words of the writ are *quod indilate*, &c.

Lane, 46.

It is held, that though the party hath a license at the time of his going abroad, that yet he is obliged to obey the privy seal, for that such license is countermandable, being only an authority or dispensation and not like an interest moving from the king.

Lane, 46; and vide Dyer, 176.

It is said, that the king cannot recall the party but by the great seal or privy signet.

3 Inst. 180.

(D) Of the King as the Fountain of Justice, and intrusted with the Execution of the Laws: And herein,

1. That all Civil Jurisdiction flows from the King.

ALL jurisdiction exercised in these kingdoms that are in obedience to our king, is derived from the crown; and the laws, whether of a temporal, ecclesiastical, or military nature, are called his laws; and it is his prerogative to take care of the due execution of them. Hence, all judges must derive their authority from the crown, by some commission warranted

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by law; and must exercise it in a lawful manner, and without any the least deviation from the known and stated forms.

Fleta, c. 17; Co. Lit. 99 a, 114. Vide tit. *Courts.*

§ The Judiciary is not a subordinate but a co-ordinate branch of the government of the United States.

Vanhorne's lessee v. Dorrance, 2 Dall. 309.

A commission to an individual as a Justice of the Peace, signed by the president, and to which the seal of the United States has been attached, vests the legal right to the office in him, although the commission be afterwards withheld.

Marbury v. Madison, 1 Cranch, 137.

In New York, when a county is divided into two by an act of the legislature, the judges appointed previous to the division, who happen to reside in that part distinguished by a new name, lose their offices, while those who reside on that part which retains the original name continue in office.

People v. Morrell, 21 Wend. 563. See Bouv. Law Dic. tit. *Judge.*

So, although the king is the fountain of justice, and intrusted with the whole executive power of the law, yet he hath no power to change or alter the laws which have been received and established in these kingdoms, and are the birthright of every subject; for it is by those very laws that he is to govern; and as they prescribe the extent and bounds of his prerogative, in like manner do they declare and ascertain the rights and liberties of the people, and therefore admit of no innovation or change but by act of parliament.

4 Inst. 164; 2 Inst. 54, 478; 2 Hal. Hist. P. C. 131, 282; Vaugh. 418; 2 Salk. 510.

From the inherent right inseparable from the king to distribute justice among his subjects, it hath been held, that an appeal from the Isle of Man lies to the king in council, without any reservation in the grant of the Isle of Man of any such right; and it was said, that though there had been exclusive words, that yet the grant must have been construed to be void upon the king's being deceived, rather than the subject should be deprived of a right inseparable to him as a subject, of applying to the crown for justice.

1 P. Wms. 329, *Christian v. Corren*.

2. Of the King's Prerogative in Ecclesiastical Matters.

The supremacy of the crown of England, in matters ecclesiastical, is a most unquestionable right, which, as my Lord Hale says, may be proved by records of undoubted truth and authority; and though, as he says, (a) the pope made great usurpations and encroachments on this right, yet these were always complained of as illegal; and those encroachments are now pared off by the statutes 25 H. 8, c. 19, 20, 21, and 26 H. 8, c. 1.

Hal. Hist. P. C. 75. (a) The pope by degrees, and whilst the people were blinded with superstition, usurped the royal authority in all matters ecclesiastical, as is manifest by the statute of provisors, which was made as a remedy for this grievance, &c. Lord Raym. 25; and vide 5 Co.; Cawdry's case, Cro. Eliz. 542; and the statutes 26 H. 8, c. 1; and 1 Eliz. c. 1; whereby such authority as the pope had, claiming as supreme ordinary, is annexed to the crown, and is declared to belong thereto of right; for which vide 4 Inst. 341; Lit. R. 232; Moor, 463; Dyer, 237; Selden Janus Anglo. 27; Co. Lit. 134; Dav. 88; 2 Inst. 580, 584.

(b) So that the king of England doth not recognise any foreign authority superior or equal to him in his kingdom, neither do the laws of the Emperor or Pope of Rome, as such, bind in the kingdom of England; but

(D) The King the Fountain of Justice. (*Church Patronage.*)

all the strength and obligation that either the papal or imperial laws have obtained in this kingdom, is only because they are and have been received and admitted in this kingdom, either by consent of parliament or by immemorial usage and acceptation in some particular courts and matters, and not otherwise.

(b) The laws of England have no dependence on the civil law, nor are governed by it, but are binding by their own authority. Hal. Hist. P. C. 616.

The king therefore is said to have two jurisdictions, one temporal, the other ecclesiastical; the latter of which is derived from the common law, though the form of the proceedings and the coercive power exercised in the ecclesiastical courts is after the form of the canon and civil law; and this being indulged to them, the judges of the common law will give credit to their proceedings and sentences in matters in which they have a jurisdiction, and believe them consonant to the law of holy church, although against the reason of the common law; and if there be a *gravamen* it must be redressed by appeal.

Show. R. 218; Roll. Abr. 530; 4 Co. 29; 7 Co. 42; 5 Co. 7; 2 Vent. 43.

But if these courts exceed their jurisdiction, and the bounds and limits prescribed them by the laws and statutes of the realm, they are subject to the control of, and may be prohibited by, the king's temporal courts; for the canon and civil law did not bind originally in England, nor have they been received universally; and therefore are called *leges sub graviore lege*, the common law still maintaining its superintendency over them.

Vide tit. *Courts.*

The king being delivered from papal usurpation, might by common law grant a commission to hear and determine ecclesiastical causes. Hence the jurisdiction of the High Commission Court was acknowledged as deriving its authority immediately from the crown: but it was held, that that court, without the help of an act of parliament, (a) could not in matters of ecclesiastical consuance use any temporal censure or punishment, as fine or imprisonment.

(a) Vide 1 Eliz. c. 1, a statute entitled "An act for restoring to the crown the ancient jurisdiction ecclesiastical," and the 16 Car. 1, c. 11, by which this court is abolished—and for the jurisdiction which is exercised, vide 22 Co. 45, &c.; 13 Co. 2 Roll. Abr. 224; 4 Inst. 332; Noy, 149; Moor, 917; March, 80; Gibs. Cod. 50.

Also, the common law hath annexed unto certain offices ecclesiastical jurisdiction, as incident to the offices: thus, every bishop by his election and confirmation, even before consecration, hath ecclesiastical jurisdiction annexed to his office, as *judex ordinarius* within his diocese; and divers abbots anciently, and most archdeacons at this day, by usage, have the like jurisdiction within certain limits and precincts; all which they derive from the crown, although the process in the ecclesiastical court runs in the name and under the seal of the bishop or ecclesiastical judge.

Vide tit. *Ecclesiastical Courts.*

The matters of ecclesiastical consuance are of two kinds, criminal and civil: their criminal proceedings extend to such crimes as by the laws of the land are of ecclesiastical consuance, (b) as heresy, fornication, adultery, and some others, wherein their proceedings are *pro reformatione morum*, and *pro salute animæ*; and the reason why they have the consuance of these and the like offences, and not of others, as murder, theft, &c., is not from the nature of the offence, for the one is as much a sin as the

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other; and therefore if the conusance were of offences *quatenus peccata contra Deum*, it should extend to all sins against God's law; but the true reason is, because the law of the land hath indulged them with the conusance of some crimes, and not of others.

2 Inst. 488; Vaugh. 212. (b) They cannot hold plea of a legal perjury, or perjury in contracts, but for perjury in their courts they may punish.—So, where one forged letters of ordination, it was held that the spiritual court may proceed to deprive him. Sid. 217; Lev. 138; Keb. 721; Keilw. 39.—So, where a parish clerk was guilty of scandalous crimes, and being proceeded against in the spiritual court, it was held on a motion for a prohibition, that they may proceed to deprive him for these crimes, though they were in their nature only punishable in the temporal courts. 2 Ld. Raym. 1507; and see Dyer, 293; Comp. Incumb. 53; Hob. Searle's case, L. P.—Cannot punish for writing a libel, being an offence indictable at law; Comb. 71.—For sacrilege the party may be proceeded against in the spiritual court, although the robbery is likewise punishable in the temporal courts. 37 H. 6, 39; Bro. *Appeal*, 31, 45; 2 Inst. 492; 2 Keb. 23; Sid. 281.—So an action at law lies for an assault and battery on a spiritual person, as also a suit in the spiritual court for irreverence to his person. 6 Mod. 156; Cro. Eliz. 655.—But for calling a woman a whore and thief, the party cannot be proceeded against in the spiritual court and by action at law, being one continued act. 2 Roll. Abr. 259. So, for solicitation of chastity which is attended with force and violence. Vide 4 Cro. 20; 2 Salk. 552, pl. 15; 7 Mod. 78; 2 Ld. Raym. 809, 1101.

The civil causes committed to their conusance, wherein the proceedings are *ad instantiam partis*, ordinarily are the business of tithes, rights of institution and induction to ecclesiastical benefices, matters of matrimony and divorce, and testamentary causes, and the incidents thereunto, as the insinuation of testaments, legacies of goods and money, &c., wherein they proceed according to the canon law, and the civil law, which is taken as a director in points of exposition and determination.

Vide tit. *Ecclesiastical Courts*, letter (D).

[The king is patron paramount of all the benefices in England. In virtue of which, the right and care of filling all such churches as are not regularly filled by other patrons belongs to the crown; whether it happen through the neglect of others, (as, in the case of lapse,) or through incapacity to present, as if the patron be attainted, or outlawed, or an alien, or have been guilty of simony, or the like.

Gibs. Cod. 763.

Upon which ground, the king hath right to present to all dignities and benefices of the advowson of bishoprics and archbishoprics during the vacation of the respective sees. Not only to such as shall become void after the seizure of the temporalities, but to all such as shall become void after the death of the bishop, though before actual seizure. And because it is a maxim in law, that the church is not full against the king, till induction; therefore, though the bishop hath collated, or hath presented, and the clerk is instituted upon that presentation, yet will not such collation or institution avail the clerk, but the right of presenting devolves to the king.

Gibs. Cod. 763; Wats. c. 9.

And it is said, that this privilege which the king hath of presenting by reason of temporalities of a bishopric being in his hands, shall be extended unto such preferments to which the bishop of common right might present, though by his composition he hath transferred his power to others. And therefore when the temporalities of the archbishopric of York are in the king's hands, the king shall present to the deanery of York, although, by composition between the archbishop and the chapter there, the chapter are to elect him: and this, because the patronage thereof *de jure* doth be-

(D) The King the Fountain of Justice. (*Church Patronage.*)

long to the archbishop, and his composition cannot bind the king, who comes in paramount, as supreme patron: for of the whole bishopric the king is supreme patron, although it be dismembered into divers branches, as deans, and other dignities; and of ancient time all the bishoprics were of the king's gift, but afterwards the king gave leave to the chapter to elect; yet the patronage notwithstanding remains in the king.

Wats. c. 9; 2 R. Abr. 343.

Upon promotion of any person to a bishopric, the king hath a right to present to such benefices or dignities as the person was possessed of before such promotion; though the advowson belongeth to a common person.^(a) This right of presenting upon promotion by the king, as making the avoidance which would not otherwise happen, did spring from the practice of the popes, and is now an uncontested right of the crown; and hath been established not only by long practice, but by many judgments upon full and solemn hearings; and that, whether the churches are new or old, and how often soever this happens successively by promotions to bishoprics from the same benefice or dignity: as was adjudged in the case of St. Martin's and St. James's.^(b) Of late, the great question hath been, on supposition of the right, how far it is answered, and the terms of the crown satisfied, by the grant of a *commendam* to retain such promotions, or any part of them, together with the bishopric. Of which question the solution hath been, that by a *commendam* for life, and for the time of continuing in such a bishopric, the turn of the crown is answered, and in such case the proper patron shall present, upon death or translation; but that the right of the crown shall not be defeated by a *commendam* granted for a term of months or years, certain and limited.

Gibs. Cod. 763. ^(a) Lord Chief Justice De Grey, speaking of this right, saith, It appears in Bro. *Presentment*, 61, to be as old as Edward the Third's time. It was exercised under Henry the Eighth and Q. Eliz. The law concerning it was doubted in Charles the Second's time, and since, but finally determined in favour of the crown in King William's time. *K. v. Bp. of London*, 4 Mod. 202. This is not a right of patronage in the king; nor is it a right of eviction, for it ejects nobody: nor an usurpation, for it is a rightful act. But it is a contingent, casual right, arising upon a particular event, the incumbent's becoming a bishop. 2 Bl. Rep. 773.—^(b) 4 Mod. 200; 3 Lev. 377, S. C.; Lev. Intr. 344, S. C.; 1 Show. 414, 441, 495, S. C.; 1 Ld. Raym. 23, S. C.; Show. P. C. 164, S. C.; Carth. 313, S. C.

But in Ireland the law is, that a man shall not be promoted to a bishopric there, until he hath resigned all the preferments which he hath in England: which preferments being void before the acceptance of the bishopric, it seemeth that in such case the king shall lose the presentation.

Burn's E. L. title *Benefice*, 128; title *Bishops*, 192. But in *Woodley v. Bp. of Exeter*, Cro. Jac. 691; it is holden, that this prerogative right of presenting accrues as well where the incumbent is promoted to an Irish, as an English bishopric. But, as the report of this case hath been lately considered in other respects as rather apocryphal, it may not be safe to rely upon its authority in this particular.

It hath been determined, that where the advowson is in common, so that the patrons are to present by turns, the prerogative presentation doth not pass for the turn of the otherwise rightful patron; for the prerogative right doth not supply, but only suspends or postpones the turn of the patron, and of all the patrons, if more than one, and doth not take away the right of the one, and leave the rest entire; for that would be rank injustice, and this, being the act of law, *nemini facit injuriam*.

Grocers' Company v. Archbishop of Canterbury, 2 Black. R. 770; 3 Wils. 214, S. C.

(D) The King the Fountain of Justice. (*Creating Officers.*)

And as the intervention of the prerogative presentation doth not satisfy or disappoint the turn of the otherwise rightful patron, neither doth it destroy the effect of a prior grant of the next presentation by the owner of the advowson.

Calland v. Troward, 2 H. Bl. 324. Judgment affirmed in B. R., 6 Term R. 439, and afterwards in the House of Lords, May 16, 1796. According to the report of the case of Woodley v. Bishop of Exeter, Cro. Jac. 691, and Winch. R. 94, it was holden, that the right of the crown in this case defeats the right of a grantee who hath the next avoidance, for his right is only to the next, and the next he cannot have, and therefore shall have none. But this report we have already observed is of very doubtful authority. Lord Hobart, though at that time one of the judges by whom it was determined, takes no notice of it in his Reports. Lord Chief Justice De Grey saith, (2 Black. R. 774,) That case is not clearly settled to be law. And in an anonymous note in the margin of Dyer, 228 b, (which is apparently the same case,) it is stated, that the court resolved, "that the grantee should have the next avoidance after the prerogative presentation, because that was the act of law, and the prerogative of the king, which excluded him from the first presentation, injures no one." But admitting such a determination to have been made, the court may have gone upon the peculiar terms of the devise, which in Winch's Entries, p. 877, are, "*Dedit et legavit cuidam Johanni Bassett, filio suo, primam et proximam advocacionem prædicta ecclesiæ de L, quæ primo et proximè contingeret post mortem ipsius Arthuri;*" and which seem expressly to confine the power of presenting to the first turn.

But if the incumbent of a *donative* is made a bishop, the king shall not present to the donative, because such a promotion doth not make an avoidance by *cession*, for the incumbent is the creature of the founder, and is not subject to ordinary and episcopal visitation.

Agreed *per cur.* 4 Mod. 213.]

3. Of his Prerogative in creating Officers.

The king as the fountain of justice hath an undoubted prerogative in creating officers, and all officers are said to derive their authority mediately or immediately from him: those who derive their authority from him are called the officers of the crown, and are created by letters patent; such as the great officers of state, judges, &c.; and there needs no greater or stronger evidence of a right in the crown herein, than that the king hath created all such officers time immemorial.

Dyer, 176; 2 Roll. Abr. 152; 4 Co. 32; 2 Inst. 425, 540; 12 Co. 116; Roll. R. 206; Show. Par. Ca. 111.

β The president "shall nominate, and by and with the advice and consent of the Senate appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But Congress may by law vest the appointment of such inferior officers as they shall think proper, in the president alone, in the courts of law, or in the heads of departments."

Const. U. S. art. 2, sec. 2. See *Marbury v. Madison*, 1 Cranch, 137; *Commonwealth v. Bussier*, 5 S. & R. 451; *Johns v. Nicholls*, 2 Dall. 184; *Johnson v. Wilson*, 2 N. Hamp. R. 202; *Bath v. Haverhill*, *Ibid.* 555; *Commonwealth v. Sutherland*, 3 Serg. & R. 145; *Hoke v. Henderson*, 4 Dev. 1.g

But though all such officers derive their authority from the crown, from whence the king is termed the universal officer and disposer of justice, yet it hath been held, that he hath not the office in him to execute it himself, but is only to grant or nominate; nor can the king grant any new powers or privileges to any such officers, but they must execute their

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offices according to the rules established and prescribed them by the law.

Lev. 219; Co. Lit. 3, 114; 2 Vent. 270; 4 Inst. 125; 6 Co. 11, 12. β One who has authority to appoint to a public office, cannot appoint himself. Commonwealth v. Douglass, 1 Binn. 77.*g*

β Where an act of the legislature creates a new office, unknown before, the officer appointed to fill it becomes subject to the control of the supreme tribunals of justice, and is liable to punishment for misbehaviour or abuse of his authority.

Geter v. Commissioners, 1 Bay, 354.

When a public office is created by the legislature, an implied authority is conferred on the officers to bring all suits, which the proper discharge of the duties of his office requires.

Pottstown v. Plattsburg, 11 Johns. 407.

An officer elected for "the year ensuing," in the absence of any restrictive provision, may hold over until he is superseded by the election of another.

McCall v. Byram Manufacturing Co., 6 Conn. 428; Spencer v. Champion, Ibid. 436; Bethany v. Sperry, 10 Conn. 200.

Whatever constitutes an essential or vital part of an office, must necessarily be ranked among the duties which the officer is bound to fulfil.

McCaraher v. The Commonwealth, 5 Watts & S. 26.*g*

Neither can the king create any new office inconsistent with our constitution, or prejudicial to the subject.

2 Inst. 540; 2 Sid. 141; Moor, 808; 4 Inst. 200.

And on this foundation it was held, that an office created by letters patent for the sole making of all bills, informations, and letters missive in the council of York, was unreasonable and void.

Jon. 231, Mounson v. Leister.

So it hath been held, that the king could not grant to any person to hold a court of equity, it being a special trust committed to the king, and not by him to be entrusted to any other except his chancellor.

Hob. 63.

So, a commission to seize the goods and imprison the bodies of all persons who should be notoriously suspected of felonies or trespasses, without any indictment or legal process against them, was held illegal and void.

4 Ass. 5; Bro. Commission, 3, 15, 16; 2 Inst. 54.

So, commissions to assay weights and measures, being of new invention, were condemned by parliament.(*a*)

4 Inst. 163. (*a*) 18 E. 3, c. 1, 4.

So, when one Chute petitioned the king to erect a new office for registering all strangers except merchant strangers, and to grant the said office to the petitioner with or without fees, it was resolved by all the judges, that the erection of such office for the benefit of a private person was against law.

Co. 116.

So, it is held by Lord Coke, that the king could not authorize persons to take care of rivers and the fishery therein, according to the method

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prescribed by the statute of West. 2, (13 E. 1, st. 1,) c. 47, before the making of that statute.

2 Inst. 478.

[By stat. 22 G. 3, c. 82, if any office of the name, nature, description, or purpose of the offices thereby abolished, shall be established hereafter, the same shall be deemed and taken as a new office.]

Vide Head of "OFFICE AND OFFICERS."

4. Of his Prerogative in making War and Peace.

The power of making war or peace is *inter jura summi imperii*, and in England (a) is lodged singly in the king; (b) though, as my Lord Hale says, it ever succeeds best when done by parliamentary advice.

Hal. Hist. P. C. 159; 7 Co. 25. (a) The *jus gladii*, both military and civil, is one of the *jura majestatis*; and therefore no man can levy war in this kingdom without the king's commission. 3 Inst. 9.—(b) The disputes touching the disposition of the *militia* are now settled, and declared to be the right of the crown, by the statutes of 13 Car. 2, c. 6; and 13 & 14 Car. 2, c. 3; Hal. Hist. P. C. 130.

A general war, according to my Lord Hale, is of two kinds:

Hal. Hist. P. C. 163.

1. *Bellum solemniter denunciatum*. 2. *Bellum non solemniter denunciatum*. The first is, when war is solemnly declared, or proclaimed by our king against another prince or state, which is the most formal solemnity of a war now in use. 2dly, When a nation slips suddenly into a war without any solemnity, which happens by granting the letters of *marque*, by a foreign prince in invading our coasts, or setting upon the king's navy at sea: and hereupon a real, though not a solemn war, may and hath formerly arisen; and therefore to (c) prove a nation to be at enmity with England, or to prove a person to be an *alien enemy*, there is no necessity of showing any war proclaimed; and it may be averred, and so put upon the trial of the country, (d) whether there was a war or not.

(c) When the courts of justice are open, and the judges and ministers of the same may by law protect men from oppression and violence, and distribute justice to all, it is said to be time of peace; so, when by invasion, insurrection, and rebellions, &c., the peaceable course of justice is disturbed, then it is said to be time of war; and the trial hereof is by the records and judges of the courts of justice. Co. Lit. 249. || Judge Blackstone says, that in order to make war completely effectual, it is necessary with us in England that it be publicly proclaimed by the king's authority, and then all parts of the nation are bound by it. 1 Black. Com. 258. But a plea of alien enemy has been held good, though no war had been proclaimed, by reason of open acts of hostility. Cro. Eliz. 142. And Sir M. Foster says, that a person may be indicted for treason in adhering to an enemy, without showing any war proclaimed, and that public notoriety is sufficient evidence of the fact. Disc. 1, c. 2, s. 12. Therefore, although according to the law of nations it is necessary to a *justum bellum* that it should be proclaimed, (Grotius de Jure B. & P. lib. 3, c. 3, s. 5, 11; and vide Cicero de Off. lib. 1,) in order that it may appear to be a war of the community, and not of private individuals, yet the subjects of this country may be affected by the legal consequences of war without any proclamation of it. || (d) Owen, 45; [Cro. Eliz. 142; Freem. 41.]

Peace is of two kinds: 1st, Positive or contracted. 2dly, Such a peace as is only a negation or absence of war. A positive peace is such as ariseth by contracts, capitulations, leagues, or truces between princes or states that have *jura summi imperii*, and is of two kinds. 1. Temporary, which is properly a truce, (e) which is a cessation from war already begun; and then the term being elapsed, the princes or states are *ipso facto* in the former state of war, unless it be protracted by new capitulations, or be otherwise provided in the instrument or contract of the truce. 2. Perpetual,

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sine termino or indefinite, which regularly continues according to the tenour or conditions of the agreement, until some new war be raised between the princes or states upon some emergent injury supposed to be done by the one party or the other; and this is properly called a league, *foedus*, (*g*) and makes the princes and states *confederati*; and though this may be variously diversified, according to the capitulations, conditions, and qualifications of such leagues, yet they are ordinarily of these kinds. 1st, Leagues offensive and defensive, which oblige the princes not only to a mutual defence, but also to be assisting to each other in their military aggresses upon others, and make the enemies of one in effect the common enemies of both. 2dly, Defensive but not offensive, obliging each to succour and defend the other in cases of invasion or war by other princes. 3dly, Leagues of simple amity, whereby the one contracts not to invade, injure, or offend the other, which regularly includes also liberty of mutual commerce and trade, and safeguard of merchants and traders in either's dominions.

Hal. Hist. P. C. 159. (*e*) The difference between a league and truce is, that a truce is a cessation from war for a certain time, but a league is an absolute striking of peace. 4 Inst. 156. Vide Molloy, c. 7, 8. (*g*) In all leagues the municipal laws of each country are excepted. 2 Show. 369.

2. A peace, which is only a negation or absence of war, is where no league or articles of peace intervene, nor yet any denunciation of war; as among divers princes in the world who never capitulated one with another, and yet there is no state of war between them; and the general rule is, *ubi bellum non est pax est*.

Hal. Hist. P. C. 160.

|| And although a neutral state may fall into the military possession of one of two belligerents still retaining her civil government, that does not necessarily constitute her an enemy of the other belligerent, if such other belligerent choose to permit a continuance of amity and commerce. Therefore Hamburg was considered an independent state (*a*) in amity with Great Britain after the French had taken military possession of her, but the senate still exercising the civil government.

Hagedorn v. Bell, 1 Maule & S. 450. (*a*) *Corpus morbidum corpus tamen est; et civitas quanquam graviter aegrotat civitas est, quamdiu manent leges manent judicia, et quae alia necessaria sunt ut ibi jus exteri consequi possint, non minus quam privati inter se.* Grotius de Jure B. & P. lib. 3, c. 3, § 2.

The king, in consequence of his power in making war and peace, hath a prerogative in the coin and royal mines, in saltpetre and gunpowder: may enter into a man's lands to make fortifications; (*b*) may lay on embargoes, grant letters of *marque* and reprisal, (*c*) press soldiers, sailors, (*d*) &c.; and though in many instances relating to these matters the strict letter of the law may be exceeded, yet from the necessity of order, government, and discipline, are they countenanced and allowed; *quod necessitas cogit defendit*.

(*b*) 1 Roll. R. 152. (*c*) Molloy, 30; 2 Roll. Abr. 175. || Vide tit. *Soldiers*.||—No person can take the ship or goods of the adverse party unless he hath a commission from the king, the admiral, or those that are specially appointed thereunto. Hal. Hist. P. C. 162; Vern. 54.—By the Law of the Admiralty, the property of a ship taken upon the high sea without letters of *marque*, vests in the king upon the taking. Carth. 399.—Clause in a charter which empowers the seizing the goods of every person is illegal and void. Show. 137. Vide 1 Black. Com. (*d*) 6 Co. 27; Hut. 134.*—*As to the pressing of sailors, see Foster R.; the case of Alexander Broadfoot, fo. 154, and 1 Black. Com. 418; and see also Comb. 245.

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β Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Const. U. S. art. 1, sect. 8.

No state shall have such power.

Const. U. S. art. 1, sect. 10.

The president of the United States has as an incident of his office a right to authorize the capture of all enemy's property, wherever by the law of nations it may be lawfully seized, and is not restrained from authorizing captures on land.

The *Emulous*, 1 Gallis. 563. See *Talbot v. Seeman*, 1 Cranch, 1; *Masonaire v. Keating*, 2 Gallis. 335; *The Venus*, 8 Cranch, 253; *La Nereyda*, 8 Wheaton, 108; *Pontz v. Louisa*, Ins. Co., 4 New Ser. 80.*g*

||The power of impressing seafaring men for the sea service by the king's commission has been a matter of some dispute, and submitted to with great reluctance, though it hath very clearly and learnedly been shown by Sir Michael Foster that the practice of impressing and granting powers to the admiralty for that purpose is of very ancient date, and hath been uniformly continued by a regular series of precedents to the present time, whence he concludes it to be part of the common law. The difficulty arises from hence, that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. The stat. 2 R. 2, c. 4, speaks of mariners being arrested and retained for the king's service, as of a thing well known and practised without dispute, and provides a remedy against their running away. By a later statute, if any waterman who uses the river Thames shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By another, no fisherman shall be taken by the queen's commission to serve as a mariner, but the commission shall be first brought to two justices of the peace inhabiting near the sea-coast where the mariners are to be taken, to the intent that the justices may choose out and return such a number of able-bodied men as in the commission are contained to serve her majesty. And by others, especial protections are allowed to seamen in particular circumstances to prevent them from being pressed. And ferry-men are also said to be privileged from being impressed at common law. All which do most evidently imply a power of impressing to reside somewhere, and, if anywhere, it must, from the spirit of the constitution, as well as from the frequent mention of the king's commission, reside in the crown alone.

1 Black. Com. 419; *Fost. R.* 154; *Comb.* 245; 2 & 3 P. & M. c. 16; 5 Eliz. c. 5; 7 & 8 W. 3, c. 21; 2 Ann. c. 6; 4 & 5 Ann. c. 19; 13 G. 2, c. 17; 2 G. 3, c. 15; 11 G. 3, c. 38; 19 G. 3, c. 75; *Sav.* 14.

The power of impressing can only be exercised on persons who have voluntarily chosen a seafaring life, and does not extend to landmen.

Fost. R. 157; *Cowp.* 519.

It has been decided, that keelmen employed in navigating rivers, (a) carpenters employed on board ships on a coasting or other trade, (b) seafaring men serving the office of headborough, (c) or being freeholders (d) or liverymen of London, (e) or watermen of London, (g) are not exempted from impressment under the several statutes. And it does not appear that the captain or master of a coal and coasting vessel is exempted. (h)

(a) 1 East, 466. (b) 13 East, 459. (c) 5 Term R. 276. (d) 5 East, 477. (e) 9 East,

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466. (g) Cowp. 512. (h) 13 East, 550, note; and see 14 East, 346; 5 Term R. 416; 7 Term R. 673.

The king has the power of granting protections against impressment, which is exercised by the board of Admiralty; but these protections are revocable at pleasure whenever the public service appears to require it; and this notwithstanding they are granted for a specified time.

Herbert's case, 16 East, 165.||

The king may declare war against one part of the subjects of a prince, and may except the latter part; as was done by King William in his declaration of war with France, where he excepted the French protestants; and of such proclamations all ought to take notice, because the war begins only by the king's proclamation.

Ld. Raym. 283, *per* Treby, C. J.

β Compacts and agreements made between allied nations and the common enemy, bind each other, when they tend to the accomplishment of the object of the allies.

Miller v. The Resolution, 2 Dall. 15.g

5. *Of his Prerogative as Parens Patriæ in taking Care of Infants, Idiots, Lunatics, and Charitable Uses.*

The king as *parens patriæ*, hath the protection of all his subjects; and in a particular manner is to take care of all those who by reason of their want of understanding are incapable of taking care of themselves and their affairs. By virtue of this high trust, infants, who by reason of their nonage are under incapacities, are under the protection of the crown; and hence arises allegiance, as a debt of gratitude, which can never be cancelled, though the subject owing it goes out of the kingdom, or swears allegiance to another prince.

||Vide head of *Infancy and Age*, vol. v.||

This trust lodged in the king, and the jurisdiction exercised herein, originally belonged to the Court of Chancery, and now, upon the dissolution of the court of wards, is again devolved on that court. Hence it is every day's practice in that court to determine as to the right of guardianship, to punish abuses in relation to their persons, &c.

1 P. Wms. 103. ||Vide head *Guardian*, vol. iv.||

If a person appointed guardian is attainted, or otherwise becomes incapable, the trust devolves on the great seal as the general guardian of all infants.

1 P. Wms. 706, in the case of the Duke of Ormond, who was appointed guardian to the Duke of Beaufort.

In the like manner and for the same reason it is, that idiots and lunatics, who are incapable of taking care of themselves, are provided for by the king as *pater patriæ*.

Vide head of *Idiots and Lunatics*, vol. v.

In like manner in the case of charities, the king *pro bono publico* has an original right to superintend the care thereof; so that abstracted from the statute 43 Eliz. c. 4, relating to charitable uses, and antecedent to it as well as since, it has been every day's practice to file informations in Chancery in the attorney-general's name, for the establishment of charities, &c.

Vide head of *Charitable Uses and Mortmain*, vol. ii., 1 P. Wms. 119.

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. *Of his Prerogative in Pardoning.*

This high prerogative is (a) inseparably incident to the crown, and the king is intrusted herewith upon a special confidence, that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case.

Co. Lit. 114 b; H. P. C. 104; 3 Inst. 233; Show. 284. (a) It is a personal trust and prerogative in him for a fountain of bounty and grace to his subjects, as he observes them deserving or useful to the public, which he can neither grant or otherwise extinguish; *per* Holt, C. J. Ld. Raym. 214, *et per* Rokeby, J. As he cannot but have the administration of public revenge, so he cannot but have a power to remit it by his pardons when he judges it proper. *Idem.* β The constitution of the United States gives to the President, in general terms, "the power to grant reprieves and pardons, for offences against the United States." As to the effect of a pardon, see U. States v. Wilson, 7 Peters, 150; 1 Baldwin, 91; Perkins v. Stevens, 24 Pick. 277; Evans v. The Commonwealth, 3 Met. 453; Commonwealth v. Roby, 12 Pick. 496; State v. Twitty, 4 Hawk. 193. If a pardon contains a condition that the party shall leave the state, the condition is void and the pardon absolute. Commonwealth v. Hatsfield, 2 Penn. Law. 37.g

Vide title "PARDON."

7. *Of Dispensations and Non obstantes.*

The power and prerogative of dispensing with laws and granting *non obstantes*, hath always been looked upon with a jealous eye, and are said to have been first invented in Rome and brought into this kingdom by the pope and clergy.

2 Roll. Abr. 179; Dav. 69; 2 Mod. 261.

But, though they have not been favoured in the courts of justice, yet it hath been always held, that the king had a prerogative in certain cases to grant dispensations and *non obstantes*, which is founded in *plenitudine potestatis*: and upon this reason, that it is impossible for law-makers by human prudence to foresee several particular cases that may happen, wherein a law that is good in general might be mischievous in some particular cases; and therefore, and for the public good, the law intrusts the king (who is intrusted with the execution of the law) to judge of such circumstances; and when such particular case happens, to exempt it out of the penalty of the general law.

11 Co. 88; Finch. 234; Dyer, 54, pl. 17.

The prevailing distinction herein hath been, that the king cannot by any previous license or dispensation make an offence dispunishable which is *malum in se*; but that in certain matters, which are only *mala prohibita*, he may to certain persons and on some special occasions; and this distinction the C. J. Vaughan (b) admits, being well understood and rightly applied, is the best guide in these matters.

12 Co. 29; Dav. 75; 5 Co. 35. (b) In the case of Thomas and Sorrel, Vaugh. 330, to 359, where this learning is fully discussed; and in Lev. 217; Sid. 6, 7, S. C.

On this distinction it was always held, that the king could not dispense with the laws against murder, adultery, stealing, incest, sacrilege, extortion, perjury, trespass, and others of the like kind; (c) and that a pardon for any such like offence that was *malum in se* before it happened was void.

Vaugh. 834. (c) Hence the resolution in the Year-Book, 11 H. 7, pl. 35, that the

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king's grant to the Bishop of Salisbury and his successors having the custody of a prison, that they shall be quit of all escapes, &c., having been allowed in *eyre*, should be a good discharge from any fine for a negligent escape out of such prison, is doubted in 2 Hawk. P. C. c. 37, § 28.

β The President of the United States has no power to dispense with the execution of the laws.

Kendall v. United States, 12 Peters, 524.*g*

But where a thing lawful in its own nature is made unlawful by act of parliament only, as the carrying bell-metal or beer, &c., out of the realm, importing certain merchandises in foreign ships, &c., selling wines beyond a certain price, exporting wool to any other place than Calais, coining money of a base alloy, and other matters of the like nature; it seems formerly to have been taken for granted, that generally the king might dispense with it as to a particular time or place, or person, or even corporation aggregate, so far as the public was concerned in it.

2 Hawk. P. C., *ubi suprâ*, and several authorities there cited.

Yet, where such dispensation could not but be attended with great inconvenience, as the introducing a monopoly, or frustrating the end for which the law was made, as the licensing of a particular person to import foreign cards or wines prohibited by parliament, and *à fortiori*, if it tended to suspend the whole statute in general, it was commonly agreed to be void.

2 Hawk. P. C. *ubi suprâ*.

Also, wherever an act of parliament gives a particular interest or right of action to the party grieved by the breach of it, as the statutes of mortmain, which give an entry to the next immediate lord for an alienation to a corporation; the statutes against maintenance, forcible entries, carrying distresses out of the hundred, suffering one in execution to escape, &c., which give an action to the party grieved by the offence prohibited; it seems to have been always agreed, that no charter by the king can be of any force to bar the right of the party grounded upon such statute; because it is a settled rule, that the king cannot prejudice the interest of the party.

Hawk. P. C. *ubi suprâ*; Hob. 214; Hard. 110.

β The remission of a penalty or forfeiture under the revenue laws of the United States by the Secretary of the Treasury under the act of 3d March, 1797, before or after the judgment, if before actual payment, extends to the shares of the officers of the customs as well as to the interest of the United States.

M'Lane v. United States, 6 Peters, 404; United States v. Morris, 10 Wheat. 246.

But a pardon by the President after condemnation, as to all the interest of the United States, does not remit the interest of the officers.

United States v. Lancaster, 4 Wash. C. C. R. 64.*g*

Also, where a statute is express, that the king's charter against the purport of it, whether with or without a clause of *non obstante*, shall be void; it is said by Sir Ed. Coke,^(a) that no clause of *non obstante* can dispense with it, unless it tend to restrain some prerogative solely and inseparably incident to the person of the king; as the right of pardoning, or of commanding the service of the subject for the public weal; which being, as he seems to argue, founded on the law of nature, are so far inseparable

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from the king, that by a clause of *non obstante* he may dispense with any statute whatsoever which tends to deprive him of them.

2 Hawk. P. C., *ubi supra*. (a) 12 Co. 18.

On this foundation the resolution of the judges in the Year-Book, H. 7, is said to be maintainable; in which it is adjudged, that where the statute of 23 H. 6, c. 8, expressly enacts, that patents to sheriffs to continue longer than a year shall be void, and the party disabled to bear the office of sheriff, notwithstanding any clause of *non obstante*; yet the king by the clause *non obstante* might make a good patent of such office for life.

2 H. 7, 6 b. Vide 2 Hawk. P. C., *ubi supra*.

In the reign of King James the Second, when the king's dispensing power was endeavoured to be extended, a difference was taken and attempted to be established in those cases, which was, that as to a general law made for public government, and in which all the king's subjects were equally interested, the king might dispense with it, but not where any right or interest vested in a particular person; and it was said to be no objection to such dispensing power, that the law was made *pro bono publico*; for that though it was *pro bono subditorum*, yet not being *singulorum*, but *populi complicati*, the king might dispense with it.

Also the following points were determined in Sir Ed. Hale's case in the same reign. 1. That the king is sovereign or absolute prince. 2. That the laws of the land are the king's laws. 3. That to dispense with penal laws, where the subject hath no particular damage, for necessary and urgent occasions, is an inseparable prerogative of the king. 4. That the king is sole judge of such necessity. 5. That this trust residing in him came not from the people, but was a sovereign right of the king *ab antiquo*. 6. That the dispensation in this case, because it came within three months before any disability incurred, was a good bar to the plaintiff's action.

Comb. 21; 2 Show. 475, pl. 440; Clift. 133.

These resolutions being thought of dangerous consequence, as tending in effect to make the execution of the most necessary laws precarious, and merely dependent on the pleasure of the king.

By the 1 W. & M. sess. 2, c. 2, it is declared and enacted, "That (a) *from and after this present parliament*, no dispensation by *non obstante* of or to any statute or any part thereof be allowed, but that the same shall be held void and of none effect, except a dispensation be allowed in such a statute."

[(a) It is remarkable, that the convention summoned by the Prince of Orange did not, even when they had the making of their own terms in the *Declaration of Rights*, venture to condemn the dispensing power in general, which had been uniformly exercised by the former kings of England. They only condemned it so far, as it had been assumed and exercised of late. But in the *Bill of Rights*, which passed about a twelvemonth after, the parliament took care to secure themselves more effectually against a branch of prerogative, incompatible with all legal liberty and limitations; and they excluded, in positive terms, all dispensing power in the crown; yet, even then, the House of Lords rejected that clause of the bill which condemned the exercise of this power in former kings, and obliged the Commons to rest contented with abolishing it for the future. There needs no other proof of the irregular nature of the old English government than the subsistence of such a prerogative, always exercised and never questioned, till the acquisition of real liberty discovered, at last, the danger of it. Hume's Hist. vol. 8, p. 241, 242. See also the Journals,] [and Gray's Debates, vol. ix. p. 297 to 307, 314 to 322, 336 to 344, 396. Chandl. Deb. vol. i. p. 394. As to the dispensing power, see the note of Mr. Amos, to Fortescue, De Laudibus Leg. Ang. c. ix., and the various authors there referred to.]

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As the above-mentioned case of Sir Ed. Hale is the most remarkable case on the subject, it may not be improper to insert it at large, as taken from a MS. report, together with the argument of Sir Ed. Northey.

This is an action of debt for 500*l.* founded on a conviction of the defendant for exercising the office of a colonel of a foot regiment, after neglect to take the oath of allegiance and supremacy enjoined to be taken by the statute 25 Car. 2, c. 2, by which statute the defendant hath forfeited the sum of 500*l.* to him that sues for the same.

Anthony Gordon v. Sir Ed. Hale, Trin. 2 Jac. 2, in B. R.

The declaration sets forth, that the defendant, Sir Ed. Hale, the 20th of Nov., *ann.* 1 *regni* of this king, at Hackington in the county of Kent, was advanced to be a colonel of a foot regiment in the said county, (which the plaintiff avers to be a military office and place of trust under his said majesty, and by authority from him derived;) and that the defendant held and exercised the said office for three months then next following, and to the time of exhibiting the bill of the plaintiff, and did doth inhabit in the said parish and county, and did not either in the Court of Chancery or in this court, in the next term or in the next quarter sessions of the peace holden for the said county of Kent or place where he did reside, or within three months after his admission to the same, take the several oaths of supremacy and allegiance; but did wholly neglect to do the same, and did continue, after his neglect, to execute the said office, and yet doth execute the same, contrary to the form of the statute in that case made and provided.

Vide Hume, x.

The declaration further sets forth, that the said Sir Ed. Hale, the defendant, 29th March last, at the assizes held at Rochester in the county of Kent, before the Ld. C. J. Jones and Mr. J. Withens, justices of *oyer and terminer* for the said county, was indicted for the said neglect, and for executing the said office after the said neglect contrary to the form of the said statute; and thereon was in due form of law convicted, as by the record thereof may appear; and the plaintiff entitles himself to the said 500*l.* forfeited by the defendant by the said act on his said conviction, and saith the defendant hath not paid him the same.

To this declaration the defendant pleads in bar, that the king's majesty that now is, after the defendant's admission to the said office, and within the three months next ensuing, and before the next term or quarter sessions of the peace after the same, and before the exhibiting the bill of the plaintiff in this court, viz., the 9th day of January in the first year of the reign of his present majesty, his said majesty by his letters patent under the great seal of England did dispense, pardon, remise, and discharge to and with the said defendant, of and from taking the said oaths of allegiance and supremacy, and from receiving the sacrament according to the use of the church of England, and from subscribing the test mentioned in the act of 25 Car. 2, (c. 2,) or mentioned and contained in any other acts of parliament, and of and from all crimes, convictions, penalties, forfeitures, damages, and disabilities incurred or to incur at any time then after for executing the said office, after he should omit, neglect, or refuse to do and perform any of the said matters enjoined to be done by the said act; and further, that his said majesty by his said letters patent did grant unto the defendant, that he should be enabled to hold the said office without taking

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the said oaths or subscribing the said test, as if the said act had never been made.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

Mr. Northey. I am counsel with the plaintiff in this case, and am humbly to show your lordship and the court the causes of this demurrer.

This action is grounded on the statute made 25 Car. 2, c. 2, which requires, that all and every person or persons, that should be admitted, entered, placed, or taken into any office or offices civil or military, or should receive any pay, salary, fee, or wages by reason of any patent or grant of his then majesty, or should have command or place of trust from or under his said late majesty, his heirs or successors, or by his or their authority, or by authority derived from him or them within this realm of England, &c., after the first day of Easter term, 1673, and shall inhabit, be, or reside, when he or they is or are so admitted or placed, within the cities of London or Westminster, or within thirty miles of the same, shall take the several oaths of supremacy and allegiance in his majesty's high Court of Chancery or in the Court of King's Bench in the next term after such his or their admittance or admittances into the office or offices, employment or employments aforesaid; and that all and every such person or persons to be admitted as aforesaid, not having taken the said oaths, shall, at the quarter sessions of that county or place where he or they shall reside, next after such his admittance or admittances into any of the said respective offices or employments aforesaid, take the said several respective oaths as aforesaid, and shall receive the sacrament of the Lord's Supper, according to the usage of the church of England, within three months after his or their admittance into or receiving the said authority and employment, in some public church on some Sunday immediately after divine service or service and sermon, and shall subscribe the test in the said act mentioned at the time when he shall take the said oaths.

And by the said act it is further enacted, that all and every the person and persons aforesaid, that do or shall neglect or refuse to take the said oaths and sacrament in the said courts and places, and at the respective times as aforesaid, shall be *ipso facto* adjudged incapable and disabled in and to all intents and purposes whatsoever to have, occupy, and enjoy the said office or offices, employment or employments, &c., and every such office and place, employment and employments, shall be void, and is by the said act adjudged void.

Then comes the clause of forfeiture, by which the plaintiff is entitled to this action, which is, that all and every such person or persons that shall neglect or refuse to take the said oaths, or the sacrament as aforesaid, within the times and in the places aforesaid, and yet after such neglect and refusal shall exercise any of the said offices or employments after the said terms expired wherein he or they ought to have done the same, being thereupon lawfully convicted in or upon any information, presentment, or indictment in any of the king's courts at Westminster, or at the assizes, every such person and persons shall be disabled from thenceforth to sue or use any action, bill, plaint, or information in course of law, or to prosecute any suit in any court of equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office within the realm of England, &c., and shall forfeit the sum of 500*l.* to be recovered by him or them that shall sue for the same,

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to be prosecuted by an action of debt, suit, bill, plaint, or information in any of his majesty's courts at Westminster, wherein no essoin, protection, or wager of law shall lie.

In this case, my lord, I shall lay down and endeavour to maintain these two things :—

First, That the plaintiff hath well entitled himself by his declaration to recover the 500*l.* demanded by him against the defendant, according to the said act 25 Car. 2, c. 2, of the late king.

Secondly, That the defendant hath not by his plea alleged any matter that can bar the plaintiff from the recovery of the same.

As to the first, I conceive, that by the said act four things are necessarily required before the informer can be entitled to bring an action for the 500*l.*

First, That such person hath been admitted into some office, place, or employment within the description and intention of the said act.

Secondly, That such person after his admission into such office hath neglected or refused to take the said oaths at the times and places by the said act directed.

Thirdly, That such person after such neglect or refusal hath continued to execute said office.

Fourthly, That such person be convicted thereupon in one of his majesty's courts at Westminster, or at the assizes, at the suit of the king, by information, presentment, or indictment.

The plaintiff hath shown all these things in his declaration.

1. It is set forth, that the defendant was admitted to be colonel of a foot regiment, which is expressly averred to be a military office and a place of trust under his present majesty, and by authority from him derived, according to the words of the said act of parliament.

2. It is expressly shown, that the defendant did neglect to take the oaths of allegiance and supremacy in the next term in the Court of Chancery or this court, or in the next quarter sessions for the county or place where he did then inhabit, or within three months next after his admission to the same, which are times and places limited and appointed by the said act for the taking of the said oaths.

3. It is expressly averred, that the defendant did execute the said office after the times expired, and his neglect to take the said oaths.

4. Lastly, it is set forth in the declaration, that the defendant was by indictment at the assizes in Kent before Sir Thomas Jones and Mr. Justice Withens, justices of *oyer and terminer* for the said county of Kent, lawfully convicted for executing the said office after his neglect to take the said oaths, contrary to the form of the said statute ; which is a conviction by one of the means, viz., by indictment, and in one of the courts, viz., at the assizes in the said statute mentioned.

These, my lord, I conceive are made necessary by the statute, but it is not incumbent on the informer to make them all appear to be so ; for as to the three first, they must be proved on the information, presentment, or indictment at the king's suit before such officer can be convicted ; but, when there is a conviction, the informer need only show the record thereof.

If then the plaintiff hath entitled himself to his action, the next thing to be considered is, the matter alleged by the defendant in bar thereof.

In speaking to this I shall consider two things.

First, Whether the defendant shall be now admitted to plead this dis-

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pensation in bar of this action, and whether he hath not lost the benefit of it, by not pleading of it in bar to the indictment whereon he hath been convicted.

Secondly, Admitting he may plead the same now, whether the same be good in law to enable the defendant to execute the said office without taking the said oaths, so that he shall be exempted from the penalty inflicted by the said act of parliament for executing the said office after his neglecting to take the oaths.

As to the first point, I shall observe to your lordship the times mentioned in the record now before you: the defendant was admitted to the office of colonel the 20th Nov., anno 1 of this king; the offence in executing the said office after his neglect to take the oaths of allegiance and supremacy, is alleged to be the 10th of March, anno 2 of this king; and the conviction for the same appears to have been the 29th of March, anno 2; and the dispensation pleaded by the defendant was granted to him the 9th day of Jan., anno 1 of this king, which was before the offence and conviction; so that as to this point the case will be but this:

An act of parliament doth enact, that he who doth neglect to take the oath of allegiance within the certain prefixed time, and shall be convict of the same by indictment, shall forfeit 500*l.* to him who will sue on such conviction for the same; the defendant neglects to take the said oath, having a dispensation of the same granted to him before the time lapsed for taking the said oath; and which (to make a case) is admitted to be a good excuse, and may be pleaded in bar of any indictment for that neglect.

The defendant is after indicted for the neglect, and pleads not guilty to the same; and an action is brought by the plaintiff against him for the 500*l.* on the said conviction, and the defendant pleads the said dispensation in bar. I conceive, with submission, he comes too late; for the defendant had his election to have pleaded the said dispensation in bar of the indictment, and to have relied on it; and that was his proper time to make use of the same or to waive it, and insist on his innocence, and plead not guilty; and when he pleads not guilty, and does not make use of the dispensation for his defence, the law construes it to be a waiving of it; and he shall at all times after be estopped by his plea and conviction thereon to say, that he did not waive the same.

To make this plain, I humbly submit to your lordship's consideration, that after the conviction the defendant could never have made use of his dispensation to have stayed the judgment on the same, which is the express opinion in the 11 H. 4. Bro. tit. *Chartres de Pardon*, pl. 15, the words of the book are, "He who pleads not guilty cannot plead a pardon afterwards, unless the pardon be of a later date than the time of his plea."

In 3 Cro. 4, Margaret and Marshall's case, the difference there taken makes out the reason of it to be what I have before offered. Marshall in the reign of Queen Mary had committed petit treason; in the 10 Eliz. there was a general pardon, notwithstanding which she was outlawed for the petit treason after, and she brought a writ of error to reverse the same; and it was there resolved, that she may assign the general pardon for error, because she had no day in court to have pleaded it, but always made default; but that it had been otherwise if she had ever appeared in court, and had not pleaded the same.

In a *scire facias* upon a recognisance, if the defendant appear, and having a lease that he may plead, do not plead it and judgment be given

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against him, he hath totally lost the benefit of his release, and shall not be relieved in an *audita querela* on the same against the said judgment, for he hath waived the benefit of it himself; but if judgment had been given against him by default on a *nihil* returned, there, he should be relieved by *audita querela*; for that he never had any time before to have pleaded it: This is agreed, my lord, in the case cited of Marshall and in Roll. Abr. 306, where divers cases to this purpose are collected together.

By this I conceive it is very clear, that as to the king, the defendant by pleading not guilty to the indictment did thereby lose the benefit of his dispensation, and could not help himself by the same against the conviction on the said indictment, either in arrest of judgment, or by error. In the next place, I conceive that the defendant shall be no more admitted to use the said dispensation against the plaintiff than he could against the king; for on the plaintiff's bringing his action for the 500*l.* forfeited, the statute vests the benefit of the conviction in him, and creates a privity between the plaintiff and defendant as much as if the plaintiff had been party to the record of the conviction; by the words of the statute this appears very plain, for the words are, *and being thereof convicted shall forfeit the sum of 500*l.* to be recovered by him who will sue for the same*; this action I take therefore to be in nature of an execution of that conviction, and therefore the defendant shall not be admitted to plead any matter precedent to the same in bar of this action.

The plaintiff in this action may, I conceive, be resembled to an administrator *de bonis non*, who by the statute 18 Car. 2, c. 8, may sue forth execution on a judgment obtained by an executor or administrator before him; and certainly no man ever thought but that statute put the administrator *de bonis non*, to all intents and purposes, in the same condition as the executor or administrator who obtained the judgment was in; and that the defendant cannot allege any matter whatsoever against him, which he could not have alleged against him who obtained the said judgment.

My lord, I conceive there is a great difference where a record of a conviction is the foundation of an action such as without which the action will not lie; and where it is an evidence only which the plaintiff may make use of or may let it alone, and yet maintain his action; as in the case of a conviction on an indictment of battery, which is evidence the plaintiff in an action for the same battery may make use of, or maintain his declaration by other proof. In the first of these cases the record must be taken to be true according to the tenor of it, till it be reversed by error; but in the other case the defendant is not at all concluded by it, for the plaintiff doth not, nor can, rely on the same as he doth on the first; for there the conviction is so much the foundation of the plaintiff's action, that I conceive he might have declared only on the same, and have set nothing out in his declaration, but that the defendant was indicted and convicted for the offence contained in the indictment.

If the defendant shall be admitted to plead this plea now, he shall thereby falsify the record of the conviction in the very point tried; which he shall never be admitted to do, as appears by Lord Coke's P. C. fol. 230.

For these reasons and authorities, I shall conclude as to the first point, that the defendant, by pleading not guilty to the indictment, hath waived the benefit of his dispensation, and shall never have advantage of the same to avoid the execution of the judgment in the conviction on

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that indictment which is to be executed by this action according to the direction of the statute.

But admitting this point to be against the plaintiff, and that the defendant hath liberty to plead the dispensation to this action, I conceive it is no bar; but that, notwithstanding the same, the plaintiff shall recover; for that the dispensation was merely void in law and could not enable the defendant to execute the said office, without taking the said oaths, nor exempt him from the penalties inflicted by the said act on his executing the said office after his neglect to take the said oaths according to the said act.

I shall not trouble your lordship with a discourse on *non obstantes* in general, nor how nor where they were brought into the world; and shall not deny, but agree, that the king hath by his prerogative a power of dispensing with penal laws in many cases; and it is a great use and advantage to the subject as well as to himself, that he hath such a power; for although acts of parliament pass with the greatest deliberation that can be, yet the judgments of the law-makers are but finite and fallible, and they cannot possibly foresee all events that may happen; and that which was well intended and specious in the theory, may be fatal in the practice; and to particular persons there may be, without the aid of this prerogative, the greatest injustice many times done by the help of a law; but though the king have such a prerogative, yet that prerogative is bounded by the law; and with some acts of parliament the king cannot dispense at all to any persons in any cases; with other acts though he may dispense, yet not to all persons nor in all cases.

That the king cannot dispense with some acts of parliament to any person, will appear from 11 H. 7, fol. 11, 12; the king cannot dispense with a law that prohibits an act that is *malum in se*; as the king cannot license a man to kill another, nor do any nuisance to the common highway; and if such licenses be granted, they are void.

The king cannot dispense with an act of parliament which is of public concernment, and in which the people have any interest; for that is so vested in them that the king cannot divest it. The statutes of 13 R. 2, c. 3, 15 R. 2, c. 5, and 2 H. 4, c. 11, being statutes declaring the jurisdiction of the court of the admiral, for that all the subjects of the realm have interest in them, cannot be dispensed with by any *non obstante*; this appears by Coke's Juris. of Courts, fol. 135. Whether the law now dispensed with be not of public concernment, and the people have not an interest in it, I shall leave to the consideration of the court, on consideration of the statute.

This I only offer to your lordship, to show your lordship, that this great prerogative of the king may be bounded.

I shall confine myself in my further discourse touching the bounding of this great prerogative of the king, purely to the statute now before your lordship; and I shall lay down this rule, that wherever an act of parliament doth absolutely and directly enjoin and prohibit the doing of any action, and doth create a disability to any purpose to fall on any person on the doing or not doing of such act, (let the concern of such statute be what it will,) the king, with submission I conceive, by reason of the clause of disability, cannot dispense with such law by a *non obstante*, either before the doing or not doing such action enjoined or prohibited, or after; although he might have dispensed with the same if such action had been prohibited only *sub modo*, as on a penalty given to the king. This I shall endeavour

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to make out by authorities; for that clearing the same will, I conceive, determine the question on this statute now before your lordship; which I shall then come shortly to consider.

By the statute 31 Eliz. c. 6, it is enacted, that every admission, institution, and induction, on any simoniacal contract to any ecclesiastical benefice, shall be utterly void; and the person so corruptly taking such benefice, shall thereupon and from thenceforth be adjudged a disabled person in law to have and enjoy the same. If a person be simoniacally inducted to any benefice, the same by this act immediately becomes void; and the incumbent is so absolutely disabled for ever after to be presented to that church, as that the king himself (to whom the law giveth the title of presentation in that case) cannot present him again to that living; for the act binds the king in that case, and he cannot dispense with the same; and this only by reason of the disability therein.

This, my lord, appears by Co. Lit. 120, 3 Inst. 154, where the difference between an act of parliament's making a disability, and prohibiting any matter *sub modo*, is taken; and so it hath been often resolved on the statute; Cro. Jac. 385. The King against the Bishop of Norwich and others, and the same case Hob. 75, are expressly so resolved; so is the case of Smith v. Sherborn, Moor, pl. 1299.

By the statute 5 E. 6, c. 16, it is enacted that every person that shall give or contract to give any sum of money for any office, or shall make any promise, agreement, or assurance for any office mentioned in the same act, shall immediately thereon be adjudged a disabled person in law to all intents and purposes to have and enjoy such office. Sir Robert Vernon being cofferer to King James the First, contracted with Sir Arthur Ingram to sell his office (the same being an office within the said act) to the said Sir Arthur, and agreed to surrender it, to the intent that Sir Arthur, might obtain a grant thereof; which was done, and Sir Arthur obtained a grant from the king of the same: The office was adjudged after to be void; and that Sir Arthur was a person disabled by the statute to take that office; and that no *non obstante* could dispense with the said act to enable him. Co. Lit. 234; Hob. 75; Cro. Jac. 386.

From these cases it is plain, the king cannot dispense with an act enacting a disability on the doing or not doing any action, after the action enjoined or prohibited to be done is done, or omitted to be done, contrary to the act; and that if this dispensation to Sir Ed. Hale had come after his refusal to take the oaths, and his exercising the office contrary to the act, it had been ineffectual to enable him against this statute.

Now, my lord, I shall consider whether the king may dispense with such act enacting such disability on the doing or not doing any action, after the action enjoined or prohibited to be done is done, or omitted to be done, contrary to such statute; and I conceive he cannot; for, with submission, the reason why the king cannot in cases cited dispense with these persons is, not because disability is attached, but because the king cannot control an act of parliament, and make a person capable against the express provisions of the same; which he doth as much do when he grants a dispensation precedent to the offence, as when it is granted subsequent. This, my lord, I shall a little enlarge on when I come to consider the statute now in question.

As, for instance, if the king should license any person who hath an office within the statute of 5 & 6 E. 6, c. 16, to sell the same, and another

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to buy it *non obstante* the said statute of E. 6, this certainly would be a void *non obstante*, although it were before any contract made for such office; and such *non obstante* would not hinder, but that the statute would avoid the said office, and the purchaser would become and remain disabled to hold such office. This was agreed by all the judges who argued for the king's prerogative to dispense with penal laws in the case of Thomas v. Sorrel, touching wine-licenses, which was in the Exchequer-chamber about ten years since; and so it doth appear by my Lord Vaughan's argument in his Rep. fol. 354, which cannot, I humbly conceive, be distinguished from this case now before your lordship.

Now, my lord, I shall consider this statute whereon this question arises; and with submission I conceive this dispensation of that statute, though granted before the offence committed, can no more be maintained to be lawful than can the dispensations in the cases before cited on the statute of the 5 & 6 E. 6, c. 16, of offices, and 31 Eliz. c. 6, of simony; but this shall be ineffectual for enabling the defendant against this act, for the same reasons that those dispensations were useless against the disabilities created by those laws.

For by this statute it is directed and positively enacted, That every person admitted to any office, &c., shall take the oaths of allegiance and supremacy, either in the Court of Chancery or in this court, in the next term after his admittance to the same, or at the quarter sessions for the county or place where he shall reside, next after such his admittance; and shall receive the sacrament within three months after his admission to the same.

Then comes the disabling cause, That every person that doth or shall neglect or refuse to take the said oaths and sacrament in the said courts and places, and at the respective times aforesaid, shall be *ipso facto* adjudged incapable and disabled in law to all intents and purposes whatsoever, to have, occupy, or enjoy the said office; and every such office shall be void, and is thereby void.

Every man by the common law had a double capacity as to offices.

1. He was capable to take the same.

2. He had a capacity to hold the same for any time whatsoever.

The statute works not at all upon the first capacity, but every person remains notwithstanding as capable of taking as ever; but it quite changes his capacity of holding, and annexes a condition precedent to the same; on performing which condition only he shall be capable; and till that be performed, by judgment of this act he is incapable.

This, I conceive, may properly be called an incapacity; for that he, who is incapable to any one purpose, is as properly said to be a person incapable as if he was disabled to all purposes.

The intent of the statute appears to be the same as if it had been enacted in these words, That no man shall hold an office above three months, unless within the three months he take the oath of allegiance, in which case it would be plain, that a disability to hold beyond three months would attach on every one who should accept an office so soon as he should accept the same; which could not be removed but by qualifying himself as the act directs.

If the dispensation pleaded will enable the defendant to hold the office without qualifying himself by taking the oaths, then may the king enable a man in a point wherein he is disabled by act of parliament; which is

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expressly contrary to the reason of the cases I before cited ; and here it doth appear the disability was attached in the defendant before the dispensation granted ; for he was admitted to the office the 28th November, and the dispensation was not granted till January ; and therefore, according to what I have offered, it comes too late.

By the statute 7 Jac. c. 6, for taking the oath of allegiance, it is enacted, That every member of the House of Commons, at any parliament or session to be assembled, before he shall be permitted to enter into the said house, shall take the said oath before the persons mentioned in the said statute.

By the opinion of Lord Vaughan, the king cannot dispense with that act ; for that every member, so soon as chosen, is *persona inabilis*, and shall not be permitted to enter the house without the oath taken.

My lord, by the very dispensation it appears, that the king's counsel, who drew it, were willing to make what provision they could against the disability incurred by the taking the said office of a colonel, which the defendant had not three months when the dispensation was granted ; yet he is thereby expressly discharged from all disabilities incurred by the said act ; which seems to admit there was a sort of incapacity then on the defendant ; to remove which the dispensation cannot be of any avail for the authorities I have before cited.

I shall humbly offer this farther matter to your lordship's consideration, that this case as to the statute is *primæ impressionis* ; and that this prerogative was never made use of herein since the making of the statute, although many persons at the time of the making of this act stood in need of the aid of it, and for want of which they lost their employments, and the late king the benefit of their services.

I shall in the next place consider the authorities of Sir Ed. Coke in his 12 Rep. 18, which I foresee will be objected to me, and I shall state it, and give such answer to it as occurs to me, and submit the whole matter to your lordship's consideration.

There my Lord Coke saith, that no act can bind the king from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*, as a sovereign power to command any of his subjects to serve him for the weal public ; and that this royal power cannot be restrained by any act of parliament ; and for that he relies on a case 2 H. 7, fol. 6, which is on the statute 23 H. 6, c. 8, which enacts, that all patents made or to be made of any office of a sheriff, &c., for a term of years, for life or longer, shall be void and of no effect, any clause or parol of *non obstante* put or to be put in such patents to be made notwithstanding ; and further, whoever shall take upon him or them to accept or occupy such office of sheriff, by virtue of such grants or patents, shall stand perpetually disabled to be or bear the office of sheriff within any county in England ; yet, saith my Lord Coke, there the king by his royal prerogative may command any person to serve him for the weal public as sheriff of any county for years or for life ; so he saith it was resolved by all the judges of England in the Exchequer-chamber in that case.

This, and some other matter of the like nature, which are put together by my Lord Coke, are, with submission, the only authorities in the law that seem to give countenance to this dispensation now before your lordship. I shall briefly consider, whether that be any authority or not ; and if it be, whether it differs from the case now before your lordship.

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To the first, I conceive it is the single opinion of Sir Ed. Coke, but he is mistaken in the case on which he relies; for by the book 2 H. 7, 6, on which he relies, it appears plainly that there never was any such resolution as he cites, but a sudden opinion given, and at that time the judges declared they would not be bound by what they then said, but advised the king's counsel to consider well the point; and so they said they would; and by Bro. Abr. tit. *Parl.* 45, 109, where he rather repeats than abridges the cases, it appears, nothing more was ever done in that matter, but it rested and was never adjudged. The great foundation failing, the superstructure of Lord Coke thereon, and his opinion, must needs fall and be rejected as an opinion grounded on a palpable mistake.

But admit that case and the reason of it to be law, that the king cannot be deprived of the power of commanding any of his subjects to serve him, yet I think it differs quite from the case now before your lordship; and the reason of it can now be no rule in this case, for these reasons.

The statute 22 H. 6, c. 8, was an act purely restraining that power the king had of commanding, and was rather a disabling the king than the subject; for it took away the power the king had of granting the office for years, life and inheritance, and by consequence was a total depriving him of the use of some of his subjects at some times; and I may very well allow that such act of parliament did not, nor can bind the king: but, my lord, in the act of parliament now in question, the prerogative nor the power of the king is not in any manner touched; for the king may grant an office to any person, or may command any person to serve him, as he might have done before this law; and he is in no sort deprived of the use of his subject by any thing in the statute; for this statute is a direction and obligation on the subjects to qualify themselves according to the act, to obey the command the king shall lay on them; and there is nothing in this act that excuses any person from serving the king, when he by his royal command requires his service, but he is at his peril to qualify himself for that service and to do the same; and if he be one incapable, it is by his own voluntary neglect, and he is punishable by law for the same, as every other man is who without any reason refuses to serve the king in what station he is pleased to require his service in.

This, my lord, will appear plain from the resolution of the case of Sir John Read, which was in the Exchequer Hil. 27 & 28 Car. 2. Sir John Read was by the late king made sheriff of Hertfordshire, and Sir John was duly sworn into the said office; but after neglecting to take the oaths and receive the sacrament enjoined by the law now before your lordship, the office became void; whereupon an information was exhibited against Sir John Read in the Exchequer, setting forth the statute of 25 Car. 2, c. 9, and that he was appointed and sworn sheriff for that county, and did neglect to qualify himself by taking the oaths according to the said act, whereby the office became void by his voluntary neglect; and the public justice in the administration thereof in that county, as to the office of sheriff, was obstructed. On this information the said Sir John Read was convicted and fined in the said court; for the court there was of opinion that the statute never intended to put it in the power of any man by his own act to discharge himself of that duty he owed the king, but hath positively enacted that every officer shall qualify himself for his duty, the not doing of which is an offence for which he is punishable; so that from

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hence it is plain there is no resemblance between the sheriff's case and any case on this statute.

There is likewise another difference between the sheriff's case and this case at bar. In the sheriff's case, the dispensation is the very same patent that the office is granted, and in the same clause, and enables the grantee before the disabilities are in any sort attached on him; but here the office was granted in November to the defendant, by which immediately, for the reasons I have before offered, he is disabled by this act; and in January after is this dispensation granted, which for reasons I have before offered, I conceive, comes too late.

For these reasons and authorities I conclude, therefore, that this dispensation, granted to the defendant, is void in law.

§ A pardon by the *President* of the United States after condemnation, *as to all the interest of the United States*, in a penalty incurred by a violation of the embargo laws, and directing all further proceedings in behalf of the United States to be discontinued, does not remit the interest of the custom-house officers in a moiety.

United States v. Lancaster, 4 Wash. C. C. 64.

But a remission of the *whole* penalty by the *Secretary of the Treasury*, after condemnation and before payment, extends to the share of the officers of the customs.

United States v. Morris, 10 Wheat. 246; M'Lane v. United States, 6 Peters, 404.

The President has no power to dispense with the execution of the laws. Kendall v. United States, 12 Peters, 524.*g*

|| The king cannot by his charter exempt any class of subjects from duties imposed upon them by act of parliament. Therefore where a statute enacted that the lords lieutenant of the several counties should charge any person with horse and arms for the county where his estate should lie towards the maintenance of the militia; it was holden, that a charter granted to the college of physicians exempting the members "from bearing or providing arms to serve in the militia in London and Westminster, or the suburbs, within seven miles thereof," did not exonerate one of the members from the charge, though his estate lay within seven miles of London.

Sir H. Sloane v. Lord Paulett, 8 Mod. 12.

It *seems* that since the 27 H. 8, c. 24, § 2, the crown cannot delegate the power of creating justices of peace.

3 Barn. & C. 767; 5 Dow. & R. 654.||

8. Of his Proclamations.

It is plain that the king by his prerogative may in certain cases and special occasions make and issue out proclamations for the prevention of offences, to ratify and confirm an ancient law, or, as some books express it, *quoad terrorem populi*, to admonish them that they keep the laws on pain of his displeasure; and such proclamations being grounded on the laws of the realm are of great force.

Fortes. de Laud. c. 9; 12 Co. 74, 75; 11 Co. 87; Dalis. 20, pl. 10; 2 Roll. Abr. 209; 3 Inst. 162.

It is likewise clear, that the subject is obliged on pain of fine and imprisonment to obey every proclamation legally made; and that though

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the thing prohibited were an offence before, that yet the proclamation is a circumstance which highly aggravates it; and upon which alone the party disobeying may be punished.

12 Co. 74; Hob. 251.

It is clearly agreed, that no private person (*a*) can make a proclamation of a public nature, except by custom, as is usual in some cities and boroughs; this being a prerogative act with which alone the king is intrusted.

Bro. *Proclamat.* pl. 1; 12 Co. 75; Crom. Jur. 41. (*a*) Sir Edmund Knightly, executor of Sir William Spencer, made proclamation in certain market towns, that the creditors should come in by a certain day and prove their debts; he was fined and imprisoned for this, because, as the book says, he did it publicly and without any authority. Bro. *Proclamat.* pl. 10.

But notwithstanding the king's prerogative herein, it seems clearly agreed, that the king cannot by his proclamation change any part of the common law, statutes or customs of the realm; nor can he by his proclamation create any offence which was not an offence before; for that these things cannot be done without legislative power, (*b*) of which in our constitution the king is but a part.

Dalis. 20, pl. 10; 12 Co. 75; 12 Co. 87 b. (*b*) By the 31 H. 8, c. 8, (now repealed,) it was enacted, That proclamations made by the king and the greater part of his council should have the force of acts of parliament; but there was a proviso, that such proclamation should not cross any statute or laudable custom of the realm. N. Bacon's Hist. 2 part, fol. 215. ||See tit. *Statute*; and Fortescue de Laud. Leg. Ang. (Amos's ed.) p. 59, 60, and the books there cited.||

And on this foundation it hath been held, that the king's proclamation prohibiting the importation of wines from France upon pain of forfeiture was against law and void; there being no war at that time subsisting between the two nations.

2 Inst. 63. ||See tit. *Smuggling and Customs.*||

So, where an act was made by which foreigners were licensed to merchandise within London, and Henry the Fourth by proclamation prohibited the execution of it, and ordered that it should be in suspense *usque ad proximum parliamentum*; this was held to be against law.

12 Co. 75.

Upon a conference between some lords of the privy council and the two chief justices (of which the Lord Coke was one) and Ch. B. and Baron Altham, the questions were, 1st, Whether the king by proclamation might prohibit new buildings in and about London? 2dly, If the king might prohibit the making of starch of wheat? And the judges were of opinion, that the subject could not be restrained in these particulars by the king's proclamation.

12 Co. 74.

But, notwithstanding the above-mentioned opinion, there are instances of persons who have been sentenced in the Star-chamber upon proclamations against the increase of buildings; and particularly in *Hob.* where a person was fined in the Star-chamber for building without brick, though upon an old foundation; and it is there said, that such buildings had an ill effect from the danger of fire, consumption of timber, and difficulty of feeding, cleansing, and governing the city; and it was said in general, that proclamations were so far just as they were made *pro bono publico*, and for public utility.

Hob. 251, Armsted's case.

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The king by proclamation may call or dissolve parliaments, may declare war or peace: for these are prerogative acts with which he is intrusted as the executive part of the law: but, (a) if there be an actual war between us and a foreign nation, it is not necessary, in pleading, to show that such war was proclaimed.

3 Inst. 162; Hal. Hist. P. C. 163. (a) Owen, 45; Rast. Ent. 605. ||Vide ante, p. 62.||

β War may exist between two nations without a declaration of war.

Bas. v. Singey, 4 Dall. 37, 46; Ponty v. Louisa. Ins. Com., 4 New Ser. 80.g

The king by proclamation may legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation: he may legitimate base coin or mixt below the standard of sterling: (b) he may enhance coin to a higher denomination or value; and may decry money that is current in use and payment; (c) and in all these cases a proclamation-writ under the great seal is necessary.

Co. Lit. 207 b; 5 Co. 114 b; Dav. 21; Hal. Hist. P. C. 192, 197. [(b) This value, Sir W. Blackstone thinks, ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. 1 Bl. Com. 278. (c) By stat. 14 G. 3, c. 70, all officers of the revenue are required to cut every piece of gold coin tendered to them, if it is not of the current weight according to the king's proclamation.]

[The king by proclamation may appoint fasts and days of thanksgiving and humiliation, and issue proclamations for preventing and punishing immorality and profaneness; and enjoin the reading of the same in churches and chapels.

Comp. Incumb. 354.

[The king by proclamation may authorize the lords of the Admiralty to grant letters of marque and reprisal, as was done in the commencement of the late war against the Dutch.]

A proclamation must be under the great seal, and if denied is to be tried by the record thereof; but, if a man pleads that he was prevented from doing a thing by proclamation, it seems the better opinion that he need not aver that such proclamation was under the great seal; for alleging that such proclamation was made, it shall be intended to have been duly made.

Cro. Car. 180, Keley v. Manning; and vide Roll. R. 172.

|| A proclamation is not obligatory where it restrains the subject in matters on which the laws are silent, though the observance of such matters might be advantageous to the public; and therefore it has been determined, that the king cannot by proclamation, or otherwise, prohibit the erection of new buildings in and about London, or forbid the making of starch from wheat.

12 Co. 74; and see 12 East, 296.||

(E) How the Rules of Law differ with respect to the King and a private person: And herein,

1. Of what things incapable, from the Dignity of his Person and Office.

FROM the dignity of his office and person the law presumes him (d) incapable of doing any wrong; (*) but, if the king command an unlawful act to be done, the offence of the instrument, as my Lord Hale says, is not thereby indemnified; for, though the king is not under the coercive

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power of the law, yet in many cases his commands are under the directive power of the law; which, consequently, makes the act itself invalid, if (e) unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law.

(d) Cannot do any wrong, Co. Lit. 19; Co. 45; 11 Co. 72, 85; Bracton, l. 3, c. 9; Stamf. P. C. 102; Hal. Hist. P. C. 43, 44. (e) If two men combat together at barriers in time of peace for trial of skill, and one kill the other, it is homicide; but if it were by the command of the king, not felony. 11 H. 7, 23 a; and vide 3 Inst. 56, 60. ||Vide *antè*.|| (*) In his politic capacity he is under the happy inability of doing wrong, because acting by his officers, and limited by law. Cons. on Law of Forfeiture, &c. 101.

The king cannot arrest in person nor imprison, nor can he command another to imprison; but it must be done by some order, writ, or precept, or process of some of his courts.

2 Inst. 187; 2 Hal. Hist. P. C. 131.—Cannot sit in judgment upon any indictment. 2 Hawk. P. C. c. 1.—Cannot be a witness. 2 Hal. Hist. P. C. 282.

The king cannot execute any office relating to the administration of justice, although all such offices derive their authority from the crown, and although he hath such offices in him (a) to grant to others.

Bro. *Prerog.* 125; Co. Lit. 3 b; 8 Co. 55; 2 Vent. 270. (a) If lands with the office of forester be granted to J S, remainder to the king in fee, this a good remainder, though the king cannot be an officer to any man, because he may grant it over. 1 H. 7, 31; Bro. *Done*, pl. 51.

The king cannot be seised to an use, because there is no means to compel him to perform it; for the Chancery has only a delegated power from the king over the consciences of his subjects; and the king, who is the universal judge of property, and who is equally concerned for the good of all his subjects, ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee.

Bro. *Feof. to Uses*, 338; Poph. 72; Dyer, 383, pl. 3; Cro. Ja. 50; Hard. 468.

If one hath the nomination to a church, and another the presentation, and such right of presentation doth accrue to the king, he that hath the nomination shall have all; (b) by reason that it is indecent for the king to do any thing as servant to another.

Dyer, 48. (b) But by Dodderidge, J., the nominator shall in such case nominate to the Lord Chancellor, who in the name of the King shall present to the ordinary. Poph. 158.

The king cannot be tenant, nor can he hold by any services from his subjects; for his possessions are called *saera patrimonía* and *dominica coronæ regis*; and on this foundation it hath been adjudged, that where lands holden of the subject came to the possession of the king by the statute of 1 E. 6, c. 14, of *chanteries*, and the king granted those lands over to another, though there was a saving in the statute of the donor, of the *ancient rents, services, &c.*, that yet the patentee should hold of the king, according to his patent, and not of the ancient lord; and that the saving in the statute, as to the services, was controlled and made void by the common law; so that the patentee was to pay the rent, by which the said lands were before holden, as a rent seck distrainable of common right, to the lord and his heirs, of whom the lands were before holden, but discharged of the services.

Co. Lit. 1; Dav. 2; 4 Leon. 40; Dyer, 313; And. 45, Stroud's case; and vide 1 Co. 47; 8 Co. 114 b; Cro. Car. 82; 2 Roll. R. 246; Jon. 234; Lit. R. 43.

The king, in regard to decency and order, cannot suffer a common re-

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covery; for in such recovery he must be either tenant or vouchee; and in both cases the demandant must count against him, and there must be judgment against him, which the law does not suffer; so he cannot come in as tenant by receipt; but if the party have any warranty he must pray in aid.

Cro. Car. 96, 97; Pigot, 74, 75.

The king cannot be tenant at will; so that if he takes a lease at will, though he may determine his will, yet the tenant cannot otherwise do it but by surrender.

Ld. Raym. 51.

The king may be appointed an executor; but, as it cannot be presumed that he has sufficient time and leisure to engage in a private concern, the law allows him to nominate such persons as he shall think proper to take upon them the execution of the trust; against whom all persons may bring their actions: also the king may appoint others to take the accounts of such executors.

4 Inst. 335; Godolph. Repert. 76.

2. *What Things enure to him in his natural, what in his political Capacity.*

The king has two capacities, the one natural, the other politic; in which last he is considered as a sole corporation, capable of taking in succession as a bishop or dean. In his natural capacity it is said, that he may purchase lands to him and his heirs; and that such lands, as also lands descending to him from an ancestor, shall go to his heir, in case he is removed from the royal estate.

Plow. 234, in the case of Wilson v. Ld. Berkley.

But my Lord Coke says, that all the lands and possessions whereof the king is seised *jure coronæ*, shall *secundum jus coronæ* attend upon and follow the crown; and therefore, to whomsoever the crown descends, those lands and possessions descend also; and that the lands and the crown are *concomitantia*.

Co. Lit. 15 b; 7 Co. 10, 12, in Calvin's case; 9 Co. 123.

If the king purchase lands to him and his heirs, he is seised thereof *in jure coronæ*; *a fortiori*, when he purchases lands to him, his heirs and successors.

Co. Lit. 16 a.

So, if lands in gavelkind descend to the king and his brother, the king shall take one moiety and his brother the other; but, if the king dies, his moiety shall descend to his eldest son, and not according to the rules of descent in gavelkind; for the king was seised of his moiety *jure coronæ*, therefore it shall attend the crown, and, consequently, go to the eldest son.

Plow. 205 a; Co. Lit. 15 b.

The king can have nothing in his natural capacity, unless in right of his duchy, or an estate-tail, by the statute *de donis*, and duchy lands would now be in the crown if not kept separate by act of parliament.(a)

Mod. 78, per Holt, C. J. (a) The statute of 1 H. 4, provides, that when the duchy lands come to the king they shall not be under such government and regulation as the demesnes and possessions belonging to the crown; for the act says, *Quod taliter, et tali modo et per tales officarios et ministros gubernentur, ac si ad culmen dignitatis regie assumpti minime fuissent*. Raym. 90. ||See the statutes 48 G. 3, c. 73; 52 G. 3, c. 161; 1 & 2 G. 4, c. 52. ||

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If the king has a title to present to a church which is void, and dies before presentment, his successor shall have the presentment, and not his executor.

2 Roll. Abr. 211.

So, if the king be seised of a ward and die, his successor shall have it, and not his executor.

2 Roll. Abr. 211.

The treasure and other valuable chattels are so necessary and incident to the crown, that in case the king dies, they shall go with the crown to the successor, and not to the executors.

11 Co. 92; 2 Roll. Abr. 211. ||As to the king's bequeathing personal estate, see 39 & 40 G. 3, c. 88; Post, p. 90.||

So, a lease for years to the king and his successors is good, and shall go accordingly, and not to his executors and administrators.

Co. Lit. 90 a; 11 Co. 92 a.

The ancient jewels of the crown are heir-looms, and shall descend to the next successor, and are not devisable by testament; but, it hath been said, (a) that the king may dispose of them in his lifetime by letters patent.

Co. Lit. 18 b. (a) Cro. Car. 344.

If the king be seised in fee of an advowson, and he create the incumbent bishop, he shall present as patron, that being a title precedent to that of the prerogative.

Ld. Raym. 26.

3. *Of the Difference in the Rules of Law as directing the King's Property, otherwise than that of a Subject.*

The king may reserve rent out of inheritances which are incorporeal, as commons, tithes, fairs, &c., because the king by his prerogative may distrain in all (b) other lands of the lessee for such rent; and having such remedy, the law adjudges the reservation good.

Co. Lit. 47; Plow. 227, in Ld. Berkley's case. (b) That this must be understood of all such other lands as his tenant has in his actual possession, and not in the possession of his lessee for life, years, or at will. 2 Inst. 184; 4 Inst. 119; and vide 5 Co. 4, 56; 1 Roll. Abr. 670; 2 Roll. Abr. 159; Lane, 59.—Whether he may distrain on other lands of the tenant that are under sequestration out of Chancery, vide 2 Vern. 714; 1 P. Wms. 306, 307.—That this prerogative shall not extend to the king's grantee. Bro. tit. *Prerog.* 68.

So, if a rent-charge is granted to the king to be issuing out of the manor of D, the king may distrain in any other the lands of the grantee. So, the king may distrain for a rent-seck, which in the case of a common person is not distrainable by common law.

Bro. *Prerog.* 77; 3 Leon. 124, 125.

The king may reserve rent payable to a stranger, contrary to the rule of law, which makes void such reservation in the case of a common person.

Moor, 162; Co. Lit. 143; 2 Roll. Abr. 447. ||See tit. *Rent.*||

But, where the king made a lease of his house belonging to his house-keeper of Whitehall, reserving a rent to the house-keeper for the time being, it was held an ill reservation; for though the king may reserve rent to a stranger, yet such a reservation as this is ill, because he cannot reserve rent to an officer who is removable at the will of the king.

Ld. Raym. 36.

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The rule of *possessio fratris* does not hold in the descent of the crown or its possessions, neither is half blood any impediment in such case; for the brother of the half blood shall be preferred to the sister in the enjoyment of the crown, as the most capable person of the two, by the advantages and prerogative of his sex, to discharge the important and weighty business of the crown.

Co. Lit. 15 b.

So, if the king hath issue a son and a daughter by one *venter*, and a son by another *venter*, and purchases lands and dies, and the eldest son enters and dies without issue, the daughter shall not inherit these lands nor any other fee-simple lands of the crown, but the younger brother shall have them together with the crown.

Co. Lit. 15 b.

If lands are given to the king by deed enrolled, without the words *successors* or *heirs*, (a) a fee-simple passeth; for he is considered as a corporation that never dies.

Co. Lit. 9; Plow. 250, S. P., and that the adding of successors in grants to the king was but of late time and a new devise; *per* Dyer, C. J. Jenk. 209, 271, S. P. (a) So, a grant by the king, without mentioning successors, shall bind the successors. Plow. 176; Yelv. 13.

If the king gives lands to a man and a woman and the heirs of their bodies, and the woman dies without issue, the man shall be tenant in tail *apres* possibility, &c.; but, if the king gives lands to a man with a relation of his in frank-marriage, and the woman dies without issue, the man shall not be tenant *apres* possibility, &c., but his interest in the land ceases upon the death of his wife without issue. This is a privilege of the king's which is not extended to a common person; and the reason of it may be this; the wealth and demesne lands of the crown are not only necessary for the honour and credit, but also for the safety and protection of the nation; and therefore in this particular case it is but reasonable, that if land applied to such particular uses and purposes be granted away, such grant should bind the king no longer than the consideration and cause of the grant continues; and therefore, in the first case, the man may be tenant in tail *apres* possibility, &c., because the services, which were the cause of the gift, are still owing, and to be performed by the tenant to the king; but in the last case, where the woman, who was the cause of the gift, dies without issue, the cause of the gift, which was the provision for the descendants of that marriage, ceases; and, consequently, if the grant continued, the tenant would hold the land free from all services.

Co. Lit. 21 b.

The king may grant a chose in action, as an obligation forfeited to him upon an outlawry, &c., and the grantee may sue by action in his own name, or by extent in the king's name, although there are not the usual words in the grant to sue in the king's name.

Dyer, 1, pl. 7; Cro. Jac. 197, 180.

|| A grant under the sign manual is sufficient to pass the property in a chose in action to the crown's grantee; and a promissory note may be assigned by the crown without endorsement; since the assignment takes effect from a general rule of law, and not from the custom of merchants or other special custom.

Lambert v. Taylor, 4 Barn. & C. 138; 6 Dow & Ry. 90.||

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So, a chose in action, as an obligation, may be granted or assigned to the king, and he may bring an action in his own name, though the deed of gift be not enrolled.

31 H. 7, 19; Bro. *Prerog.* 40. || But see the statute 7 Jac. 1, c. 15.||

If a man enters into an obligation to two, and one of the obligees assigns to the king, or is outlawed, the king may bring an action in his own name, and shall recover the whole debt (*a*) to his own use.

Bro. *Prerog.* pl. 23; Jenk. 65, S. P., though one of the obligees might have released the obligation. Lucas R. 245, S. P., *per* Parker, C. J. (*a*) If lands descend to the king and a common person, the king shall have but a moiety; for to take the whole would be a wrong, which the king cannot do by his prerogative. Plow. 247 a.

|| For the king cannot, by reason of his dignity, be partner with a subject, and neither can he lose his right. However, in favour of commerce it has been recently holden, that, on an extent against one of several partners, only the interest of that one shall be taken.

1 Wightw. 50.||

Before the statute *de donis*, when the king created a conditional fee, there was no reversion but a possibility; and if the donee had issue and aliened, the king's possibility was barred as well as that of a common person; but after the statute *de donis* had turned that possibility into a reversion, and after common recoveries were allowed to be common conveyances, and to bar remainders and reversions, it became a question, how far a recovery could bar a remainder or reversion vested in the king. And herein the judges determined, that though a recovery suffered by tenant in tail barred the estate-tail, that yet it did not (*b*) divest any interest the king had in remainder or reversion, it being unreasonable to strip the king of any part of his revenue upon the consideration of an imaginary recompense; but they allowed that the estate-tail, as to the issue, was barred; for that otherwise the estate-tail in the subject must be perpetuated, which is against the policy of the law.

Bro. *Assur.* pl. 6; Bro. tit. *Recovery*, 31, tit. *Tail*, 41; Co. Lit. 372; Plow. 483, 553; Dyer, 344; Moor, 344; Piggot of Recoveries, 85. (*b*) The act of the party, as a fine or common recovery, shall never divest any estate, remainder or reversion, out of the king; but by act in law a remainder or reversion may be divested out of the king.—As, if there be tenant in tail, remainder to A in fee, tenant in tail discontinue in fee, and take back an estate to himself for life, remainder to the king in fee; tenant in tail die; the issue is remitted, and the remainder pulled out of the king, and vests in A.—So, if a recovery be on a good title against tenant in tail, and the king have the remainder by a defeasible title, there it shall divest the remainder out of the king, and restore and remit the right owners.—But, if a gift be made to A in tail, remainder to B in tail, remainder to the king in fee; if in this case A suffer a common recovery, this bars A and his issue, and the remainder to B, but not the king's reversion; for that cannot be discontinued or put to a right, or plucked out of him by the act of a third person. Piggot of Recoveries, 86, 87. || See *Mitford v. Elliott*, 1 Moo. R. 435; Cru. Dig. xxxiii. xxiv. (3d edit.)||

But in the reign of Henry the Eighth an act of Parliament was made to invalidate even recoveries against the issue in tail, where the reversion or remainder was in the crown; the intention of which act was to perpetuate those estates in families which the king himself had given, or for money or other consideration had procured to be given, to any subject, as a reward for his services to the crown; that the descendants of that stock might never forsake the interest of the crown which had so liberally rewarded their ancestor's loyalty.

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And therefore by the 34 & 35 H. 8, c. 20, it is enacted, that if the king give any of his own manors, lands, &c., or cause or procure another, in consideration of money or other lands, to give any manors, &c., to any of his subjects or servants in tail, in recompense of their service, remainder to the king in fee-simple or fee-tail, such estates-tail are not to be barred; nor shall any feigned recovery to be had by assent of parties against any tenant or tenants in tail of any lands, &c., whereof the reversion or remainder, at the time of such recovery had, shall be in the king, bind or conclude the heirs in tail; but after the death of every such tenant in tail, against whom such recovery shall be had, the heirs in tail may enter, hold and enjoy the lands, &c., recovered, according to the form of the gift in tail, the said recovery notwithstanding.

In the construction of this statute, the following opinions have been holden:—

That if a reversioner or remainder-man upon an estate-tail grant the reversion or remainder to the king, this is no security to the issue in tail, because the estate-tail was neither of the gift or other provision of the king, and consequently not within the act.

Moor, 195; Yelv. 149; 2 Co. 15, Wiseman's case.

So, if a man make a gift in tail, and the crown descend on him, or if the king's ancestor, not being king, make a gift in tail, and the reversion descend on him, the estate-tail may be barred.

2 Co. 15; Co. Lit. 372.

If a man makes a gift in tail, remainder in fee, he in remainder grants his estate to another for life, remainder to the king in fee, on condition to be void on payment of money; recovery by tenant in tail bars the king's remainder and condition; for the grant was void.

2 Co. 52; Noy, 132; Yelv. 149; Leon. 8.

If a subject by the king's provision or procurement makes a gift in tail, and then grants the reversion to the king for life or years only, in this case the estate-tail, remainders, and reversions may be all barred; for the reversion or remainder in the king must be in fee or in tail.

Piggot of Recoveries, 88, 89.

If the king grant an estate-tail, reserving the reversion to himself, and after grant the reversion to another, tenant in tail may suffer a recovery, and thereby bar the reversion.

Piggot, 88.

Therefore when Henry the Eighth gave lands to Michael Stanhope and his wife and heirs of their body, in consideration of services, &c.; Michael died, and his son and heir petitioned the queen to grant the reversion to some persons in fee, to the intent that he might make a lease for ninety-nine years by way of mortgage: and entered into a recognisance to the queen, conditioned that nothing should be done, whilst the reversion was out of the crown, prejudicial to the crown; and accordingly the queen conveyed the reversion to the Lord Burleigh and Sir Walter Mildmay, in fee; then the son made a lease for ninety-nine years, and suffered a recovery; and then the trustees reconvey to the queen; it was resolved, 1st, That the grant of the queen was good. 2dly, That during the time the reversion was out of the crown, the son was not restrained from aliening within the statute, and so the recovery good to bind the issues; but a fine or recovery, after the re-grant to the queen,

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would not have been good to bind the issue, as it seems; because that act doth not require that the reversion should continue always in the king, (a) but it sufficeth if it be in him at the time of the fine levied or recovery suffered.

Raym. 288, 358; 2 Jon. 251, *Gardner v. Bambridge*. (a) *Qu.* and vide Hard. 409.

If tenant in tail of the gift of the king makes a gift in tail, the second donee is not within the statute: for his estate, as far as it could, disaffirms the reversion of the king, though it could not take it out of him; and his possession was injurious to the estate given by the king.

2 Jon. 250, 251, *Earl of Ormond's case*, cited to have been adjudged by eleven judges. 13 Car. 1.

King Richard the Third, by letters patent, gave several lands to the Earl of Derby and the heirs male of his body, in consideration of great services to the crown, &c.: afterwards, by a private act made 4 Jac. 1, several alterations were made in this estate; as that Charles, then Earl of Derby, should hold and enjoy them for his life; and after his death, that they should go to James his son and heir apparent, and the heirs male of his body; and so to the second, third, &c., and seventh son of Earl Charles; and to several others in tail-male, who by the limitation of the letters patent would have succeeded to the estate upon failure of issue male of Earl Charles; with power for Earl Charles and the sons successively to make leases for lives or years, and jointures for wives. After Earl Charles's death, his son Earl James levied a fine of these lands and sold them to a stranger; yet upon special verdict in ejectment brought after his death by his son, it was resolved by all the judges in the Exchequer-chamber, except three, that the fine was no bar; for that the reversion continued in the crown, and that these estates given by 4 Jac. 1 were no new estates, but all within the compass of the first tail created by the letters patent, and only a distribution of the enjoyment of them, and all to the same persons who would be entitled under the letters patent; and the power to make leases was with conformity to the power of tenant in tail; and that to make jointures was in lieu of dower: besides there was a saving to the king, and all other persons, all such rights, &c., so as the prerogative of the king, by his reversion to restrain the tenant in tail from barring his issue, was saved; and the eighth, ninth, and all other sons inheritable by virtue of the entail let in, though the first, &c., and seventh only were named; and the alterations were only in accidents, not in the substantial parts of the limitations; and so within 34 & 35 H. 8, c. 20.

Raym. 260, 286, 319, 350; 2 Jon. 249, *Earl of Derby's case*.

If the king in consideration of money, or other consideration by way of provision, procure a subject to settle his lands on one of his servants in tail, for recompense of service, by deed of bargain and sale enrolled, with remainder to the king in fee; and all this appear on the record; the tenant in tail cannot bar his issue, being protected by the express words of the statute.

Co. Lit. 372; *Piggot*, 91.

It hath been held, that the latter words of this act, viz., *had done or suffered by or against any such tenant in tail*, must be intended where tenant in tail is party or privy to the act, be it by doing or suffering that which should work the bar, and not by mere permission. As, if tenant in tail of the gift of the king, reversion to the king, be disseised, and dis-

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seisor levy a fine, and five years pass, this bars the estate-tail; and so, if a collateral warranty be made by the ancestors of the donee, and the donee suffers the warranty to descend, without any entry made in the life of the ancestor, this binds; because he is not party or privy to any act either done or suffered by or against him.

11 Co. 78; And. 46; Co. Lit. 373; Moor, 467; Cro. Car. 13; Cro. Eliz. 595; Yelv. 72; 8 Co. 77; Sid. 166.

If the king make a lease, reserving rent, with a clause of re-entry for non-payment, the king (a) is not obliged to make any demand previous to his re-entry, but the tenant is obliged to pay the rent for the preservation of his estate; because it is beneath the royal dignity of the crown to attend a subject, to demand the rent; but the law for the support of that dignity obliges every private person to attend the king with the services due to him.

2 H. 7, 8; Bro. *Prerog.* pl. 101. || See tit. *Rent.* || (a) But this prerogative is not to be extended to the duchy lands. Moor, 149, 154, 11.

But, if the king, in cases where he need not make a demand, assigns over the reversion, the patentee cannot enter for non-payment without a previous demand; because the privilege is inseparably annexed to the person of the king for the support of his royal dignity: and therefore shall not be extended to cases where the king is no way concerned.

4 Co. 73; Moor, 404; Cro. Eliz. 462; Dyer, 87; And. 304.

So, if a prebendary make a lease rendering rent, and if the rent be arrear and be demanded, that it shall be lawful for the prebendary to re-enter; if the reversion in this case come to the king, the king must demand the rent, though he shall be by his prerogative excused from an implied demand; for the implied demand is the act of the law, the other the express agreement of the parties, which the king's prerogative shall not defeat; therefore in the case of the king, if he makes a lease reserving rent, with a proviso that if the rent be in arrear for such time, (being lawfully demanded, or demanded in due form,) that then the lease shall be void; it seems that not only the patentee of the reversion in this case, but also the king himself, whilst he continues the reversion in his own hands, is obliged to make an actual demand by reason of the express agreement for that purpose.

Moor, 210; Dyer, 87.

There can be no occupant of any of the king's possessions; and therefore if the king grants lands to A during the life of B, and A dies, living *cestui que vie*, the laws allow no man to gain the possession which is now vacant by the death of A, but preserves it for the king: for this reason, that he is presumed to be taken up in the public affairs of the kingdom, and therefore not at leisure to attend his own private concerns: also, the king's grants proceeding from his own bounty and liberality, none ought to have any benefit from them but those for whom he first designed them; and therefore when he made the grant to A during the life of B, though he intended A should have the benefit of it during the life of B, yet if A dies before B none can make himself a title under the grant, because it was made only to A, nor ought any one by way of occupancy to take advantage of a grant made to A for his particular services; because that were to extend the king's bounty further than he designed it, whereas such a grant in the case of a common person ought

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to be taken most strongly against the grantor, because he parted with his land for the life of B upon a valuable consideration, and therefore is no sufferer if he does not enjoy it during the time for which he granted it away. Also, no man can make himself a title to the king's possessions, without matter of record; and therefore none can claim any of them as occupant, because that is an act *in pais*, and no matter of record.

Co. Lit. 41; 2 Roll. Abr. 150. β Statutes of limitations do not bind a state or the United States. *United States v. Hoar*, 2 Mason, 311; *Lindsay v. Miller*, 6 Peters, 666; *Conn et al. v. Penn et al.*, 1 Pet. C. C. 662; *Johnson v. Irwin*, 3 S. & R. 292; *Bagley v. Wallace*, 16 S. & R. 245; *The People v. Supervisors of Columbia County*, 10 Wend. 363. (But as to New York, see 2 Rev. Stat. 295—297, Sec. 18—28.) *Commonwealth v. McGowan*, 4 Bibb, 62; *Weatherhead v. Bledsoe*, 2 Tenn. Rep. 352; *People v. Gilbert*, 18 Johns. 227; *Wilcocks v. Fitch*, 20 Johns. 472; *Han v. Gitting's Lessee*, 2 Har. and J. 112; *Stewart's Lessee v. Mason*, 3 Har. & J. 507; *Stoughton v. Baker*, 4 Mass. 522; 4 Bibb. 554; *Nimmo v. Commonwealth*, 4 Hen. & M. 57; 2 Scott, 276; 1 Hodges, 215. g

If the king makes a lease reserving rent, the tenant must pay it without demand, either to his receiver for that purpose, or at the receipt of the Exchequer, as well as if by words of the lease the rent had been made payable at the Exchequer, or into the hands of his receiver; but, if the king grants the reversion, the patentee must demand the rent upon the land, that being the place appointed by law for a common person to demand it on.

Co. Lit. 201 b; Cro. Eliz. 462; Moor, 404; 4 Co. 73; Dyer, 87.

If the king make a feoffment on condition, that upon payment by the king of 100*l.* such a day the feoffment shall be void, the feoffee must apply to the king at the day; for the king is not obliged to make a tender, as in the case of a common person.

Roll. R. 169.

The deed of a private person hath a relation only to the time of the delivery, and not to the time of the date; (*a*) but the king's charter hath relation to the time of the date; for being of record, it cannot be averred to have been executed on any time than that on which it bears date.

Plow. 491. \parallel (*a*) See Co. Lit. 46 b; Cowp. 714; 4 Barn. & C. 910. \parallel

If the king presents to a church, and his clerk is admitted and instituted, yet before induction the king by his prerogative may revoke such presentation; nay the presentment of another is in law a repeal and revocation of such presentment, and that without any notice to the ordinary; but in the case of a common person, by presentation and institution he hath given up his power to the ordinary, and cannot afterwards vary, alter, or revoke his presentation. But some (*b*) books hold, that after a presentment only he may vary; and this seems to be the right distinction and better opinion at this day.

Vide Comp. Incumb. 223, 224, and several authorities there cited. (*b*) Latch, 254; 2 Roll. Abr. 354; Dyer, 392; Goulds. 163,

\parallel By the 39 & 40 G. 3, c. 88, § 10, after reciting his majesty's gracious desire that all such personal estate and effects as his majesty shall be possessed of at his demise, and which he may dispose of by will, shall be subject to the payment of such debts as during his life are properly payable out of the privy-purse; and that it is reasonable that all such personal estate and effects as any of his majesty's successors shall be possessed of in like manner, shall be subject to the like charge; and it is

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expedient to fix what personal estate of his majesty and his successors is subject to testamentary disposition, and in what form such disposition shall be made; it is enacted and declared, that all such personal estate of his majesty and successors as consists of moneys which may be issued or applied for the use of the privy-purse, or moneys not appropriated to the public service, or goods or chattels which have not come to his majesty in right of the crown, shall be deemed personal estate of his majesty and his successors, subject to testamentary disposition; and that such last will shall be in writing under the sign manual of his majesty and his successors, and all and singular the personal estate so liable to testamentary disposition shall be liable to the payment of all debts properly payable out of the privy-purse; and that, subject thereto, the same personal estate and effects of his majesty and his successors, or so much as shall not be bequeathed as aforesaid, shall go in the same manner on the demise of his majesty and his successors as the same would have gone if this act had not been made.||

4. *That his Rights shall be preferred to a Subject's where they happen to meet.*

It is an established principle in law, that where the king's right and that of a subject meet at one and the same time, the king's shall be preferred.

Co. Lit. 30 b; 4 Co. 55; 9 Co. 129; Hard, 24. In case of concurrent titles between the king and subject, the rule is *detur digniori*. 2 Vent. 268. β For priority of the United States in payment of debts, see *United States v. Fisher*, 2 Cranch, 358, 395; *United States v. Floor*, 3 Cranch, 73; *Harrison v. Sterry*, 5 Cranch, 289; *Thelusson v. Smith*, 2 Wheat. 396; *United States v. Howland*, 4 Wheat. 108; *Conard v. Atlantic Ins. Co.*, 1 Peters, 386, 439; *Field v. United States*, 9 Peters, 182; *Brent v. Bank of Washington*, 10 Peters, 596; *Beaston v. Bank of Delaware*, 12 Peters, 102; *Smith v. Tinker*, 2 Day's Cas. 236; *McLean v. Rankin*, 3 Johns. 369; *Jackson v. Oddie*, 2 New Ser. 555; *United States v. Hawkins*, 4 New Ser. 318; *United States v. Banlos*, 5 New Ser. 568; *Bartlet v. Prince*, 9 Mass. 431; *Watkins v. Otis*, 2 Pick. 88—100; *Cabot v. Haskins*, 3 Pick. 83, 93; *Marshall v. Barelay*, 1 Paige, 159; *United States v. Crookshank*, 1 Edw. 233; *United States v. Hunter*, 5 Mason, 62, S. C. 5 Peters, 173; *United States v. Wardwell*, 5 Mason, 82.*g*

Hence it is said, that if there be a lord mesne and tenant, and the tenant pay the rent at the day to the mesne, before noon; and after on the same day the mesne die, his heir within age, the tenant shall pay it over again to the king.

3 Leon. 251.

If a woman marries and hath issue, and lands descend to the wife, and the husband enters, and after the wife is found an idiot by office, the lands shall be seized for the king, according to this maxim, that when the title of the king and a common person begin at one instant, the title of the king shall be preferred.

Co. Lit. 30 b.

So if the woman had been the king's nief, and one had married her without the king's license, &c., and lands had descended before or after issue, yet the king, upon office found, shall have them.

Co. Lit. 30 b; 4 Co. 55.

Baron and feme joint purchasers of a term for years, the husband drowns himself, the lease is forfeited, and wife surviving shall not hold it against the king or his almoner; because the title of the king and a common person coming together, the king's shall be preferred.

Dyer, 108; Plow. 260, *Dame Hale's case*.

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5. *Of Acts of Parliament which extend to or bind not the King.*

Herein a general rule hath been laid down and established, viz.: that where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the king shall be bound by such act, though not particularly named therein.

Plow. 136, 137, in Lord Berkley's case; 11 Co. 68 b; 5 Co. 14; 7 Co. 32.

But where a statute is general, and thereby (a) any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, (b) unless the statute is made by express words to extend to him.

11 Co. 68. (a) And it seems that the usual saving of the king's right, &c., is only *ex abundanti cautela*, and not of absolute necessity. Show. P. C. 179. (b) But may take advantage of an act of parliament, though not particularly named. 11 Co. 68 b; Leon. 159. β See United States v. Knight, 14 Peters, 315; Weatherhead et al. v. Lessee of Bledsoe, 2 Tenn. 357.g

On this foundation and these distinctions it hath been held,

That the statute of Westm. 2, (13 Ed. 1, stat. 1,) *de donis* extends to and binds the king; as, where lands were given to the king and the heirs of his body, it was adjudged that the king's prerogative had not given him a greater estate than in the case of a common person; and that an alienation by him would be a tort and an injury to the donor, which the king cannot do.

Plow. 238, &c., Lord Berkley's case, cited in 11 Co. 72; 5 Co. 14; Co. 44.

So it hath been adjudged and also held in parliament, that the king is bound, though not named, by the 13 Eliz. c. 10, (c) which restrains ecclesiastical persons from making leases, &c., this being a general law, and for the public good.

11 Co. 75, case of Magdalen College; 5 Co. 15 b; Roll. R. 151. (c) The statute 1 Eliz. c. 19, which restrains bishops from making estates, hath a proviso that it shall not extend to the king; which, my Lord Coke says, was of absolute necessity; for that otherwise the king would be bound by it. 5 Co. 54 b.—It seems the law was held otherwise on the stat. 13 Eliz. c. 10, and therefore where a lease was made to the king by a dean and chapter, and the king had assigned it over, after that the law came to be held that the king was bound, the assignee had his lease made good to him in Chancery against the statute, because he could not know the law in a matter so dubious. Roll. Abr. 378.

So the king is bound, though not named, by the statute 32 H. 8, c. 28, against discontinuances by husbands of their wives' estates, &c., for this being an injury to the wife, it shall extend to the king, whose most immediate concern is to relieve his subjects from any injury or wrong.

2 Inst. 681; Show. R. 209.

So the king, though not named, is bound by the statute of Merton, 20 H. 3, c. 5, made against usury in doubling the rent, in the case of an infant heir who has made default in payment.

35 H. 6, 61; Plow. 236 b; 2 Inst. 89. ¶ And before the 58 G. 3, c. 93, the crown could not enforce payment of a bill of exchange tainted with usury in its original formation. See 4 Price R. 50.¶

So the king, though not named, is bound by the 10 c. of the statute of Merton, 20 H. 3, which ordains, that suit to the lord may be done by attorney, &c.

Plow. 236 b; 2 Inst. 99.

The king is bound by the 31 Eliz. c. 6, against simony; being a law made for the advancement of religion.

Co. Lit. 120.

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So the king, though not named, is bound by the 27 Eliz. c. 4, against voluntary conveyances to defraud purchasers; so that a voluntary conveyance to the king is as much void against a subsequent purchaser for a valuable consideration, as in the case of a common person.

11 Co. 74 b.

Bound by the statute Westm. 1, (3 Ed. 1,) c. 5, that none shall disturb elections upon pain of great forfeitures.

2 Inst. 169; 4 Mod. 207.

Bound by the statute of Marlbridge, (52 H. 3,) c. 22, that none may distrain his freeholders without the king's writ.

2 Inst. 142; Show. R. 209.

By an act of parliament, 22 Car. 2, c. 11, the parishes of St. Michael, Wood street, and St. Mary, Staining, in London, were united and established as one parish church; and it was provided, that the first presentation should be made by the patron of such of the said churches, the endowments whereof were of the greatest value; the king was patron of St. Mary, Staining, (of far less value,) and a common person patron of St. Michael, Wood street, who presented Mr. Cooke; on a *caveat* entered against the institution, it was determined by civilians, by the advice of lawyers at Doctors-Commons, that this statute, though in the affirmative, and without any negative words, extended to, and so far bound the king, as to deprive him of any preference he might have by his prerogative, as in cases where his interest is intermixed with others; and that the act of parliament giving a new estate to the king, and prescribing the manner of enjoyment, the method limited must take place of the king's prerogative.

4 Mod. 207; Show. R. 208, Crooke's case—at the end of the case it is said, that there were two instances in London where under colour of this prerogative the king's presentee was preferred; but this is said to have been done by Jefferies, and never contested.

But as acts of parliament are to be construed according to the subject-matter, and not to be extended further than the intention of the legislature; hence in a variety of cases we find it determined, that general words in an act shall not oust the king of his prerogative.

Plow. 240; Hob. 146; 7 Co. 32; Moor, 540.

As on the statute *quia emptores terrarum*, which enacts, *that none shall alien lands in fee to hold of himself*: yet it is held, that the king may give lands in fee to hold in frankalmoigne or other services.

Lit. 2 140; Co. Lit. 98; Plow. 240; 11 Co. 68 b.

So the 12 c. Mag. Cha. which provides, *quod communia placita non sequantur curiam nostram sed teneantur in aliquo certo loco*, does not bind the king; but that he may bring an action of debt or *quare impedit* in B. R.

Plow. 240 b, 244 a; 11 Co. 68 b.

So of the statute Westm. 2, (13 Ed. 1, stat. 1,) c. 17, which provides, that where divers inheritances by knight's services descend, *quod ille dominus de cætero habeat maritagium de quo antecessor suus prius fuerit feoffat.*

Plow. 240 a.

Not bound by the statute of Marlbridge, (52 H. 3,) c. 9; but all coparceners, in respect of the lands descended on them, must each of them do service as before the making of the statute.

Plow. 240 b.

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Not bound by the statutes of limitation,^(a) nor by the statute of Westm. 2, (13 Ed. 1, stat. 1,) c. 5, which makes a plenary for six months a good plea.

11 Co. 68; Plow. 244; Comp. Inc. 198. (*a*) Vide 3 Inst. 188. [Though the crown is not bound by the statute of limitations, yet a grant may be presumed from great length of possession. It was so done in the case of the Corporation of Hull v. Horner, Cowp. 102: not that, in such cases, the court really think a grant has been made, because it is not probable a grant should have existed without its being upon record; but they presume the fact, for the purpose and from a principle of quieting the possession. *Per* Lord Mansfield, Cowp. 215.] *β*As to presumption of a grant generally, see *Hepburn v. Auld*, 5 Cranch, 262; *Prevost v. Gratz*, 6 Wheat. 481; *Ricard v. Williams*, 7 Wheat. 59; *Blight's Lessee v. Rochester*, *Ibid.* 535; *Jackson v. Porter*, 1 Paine, 457; *Tyler v. Wilkinson*, 4 Mason, 397; *Strickler v. Todd*, 10 Serg. & R. 68; *Mather v. Trinity Church*, 3 Serg. & R. 509; *Newman v. Rutter*, 8 Watts, 51; *Commonwealth v. McDonald*, 16 Serg. & R. 390; *Hoy v. Sterrett*, 2 Watts, 327; *Worrall v. Rhodes*, 2 Whart. 427; *Jackson v. Miller*, 6 Wend. 228; *Jackson v. Russell*, 4 Wend. 543; *Manten v. Butler*, 3 Wend. 149; *Schauber v. Jackson*, 2 Wend. 13; *Mitchell v. Walker*, 2 Aikens, 266; *Brunswick v. McKane*, 4 Greenl. 508; *Mundall's Lessee v. Clerklee*, 3 Har. & J. 462; *Wright v. Freeman*, 5 Har. & J. 467; *Beall's Lessee v. Lynn*, 6 Har. & J. 336; *Bolling v. The Mayor*, 3 Rand. 563; *Farrar v. Merrill*, 1 Greenl. 17; *Sumner v. Child*, 2 Conn. 607; *Fitz-Randolph v. Norman*, 2 Taylor, 131; *Arthur v. Arthur*, 2 Nott M. C. 96; *McClure v. Hill*, 2 Rep. Con. Ct. 420; *Alston's Lessee v. Saunders*, 1 Bay, 26; *King v. Hall*, 1 Tenn. R. 209; *Palmer v. Hicks*, 6 Johns. 133; *Jackson, ex-dem. v. Murray*, 7 Johns. 5; *Brattle Square Church v. Bullard*, 2 Met. 363; *Commonwealth v. Low*, 3 Pick. 408; *Valentine v. Piper*, 22 Pick. 85; *Melville v. Locks, &c.*, 16 Pick. 137; *S. C.*, 17 Pick. 255; *White v. Loring*, 24 Pick. 319; *Ryder v. Hathaway*, 21 Pick. 298; 2 Tenn. R. 308, 312; 2 Hals. 6; *Martin & Yerger's Rep.* 228; *State v. Dunham*, 2 Penning. 1050; 2 Hay, 12, 128, 287; *N. C. Term R.* 131; 2 Dev. 402; 4 Dev. 180; 7 Monr. 418; 4 Younge & C. 1; 1 Ohio, 316, 349; 5 Ohio, 456.*g*

|| The crown is certainly not bound by the statute of limitations; and therefore where a note comes to the hands of the crown by forfeiture of the payee, the statute ceases to run from the time it vests in the crown. But if the statute has run out against the demand before the note vests in the crown, then the crown is barred.

Lambert v. Taylor, 4 Barn. & C. 153; *Rex v. Morral*, 6 Price, 24. || *β*See *United States v. Hoar*, 2 Mason, 311; *Conn v. Penn*, 1 Pet. C. C. R. 662; *Lindsay v. Miller*, 6 Peters, 666; *Johnson v. Irwin*, 3 S. & R. 292; *Bagley v. Wallace*, 16 S. & R. 245; *Ricard v. Williams*, 7 Wheat. 59; *People v. Supervisors of Columbia County*, 10 Wend. 363; *People v. Gilbert*, 18 Johns. 227; *Wilcox v. Fitch*, 20 Johns. 472; *Hall v. Getting's Lessee*, 2 Har. & J. 112; *Steuart's Lessee v. Mason*, 3 Har. & J. 507; *Commonwealth v. McGowan*, 4 Bibb, 62; *Weatherhead v. Bledsoe*, 2 Tenn. R. 352; *Stoughton v. Baker*, 4 Mass. 522; 18 Johns. 227; 4 Bibb, 554.*g*

Nor by the statute 27 E. 1, (stat. 1, c. 4,) which gives the trial by *nisi prius* in the country.

11 Co. 68.

Neither the statute-merchant, those concerning the staple, the statute of frauds, nor those relating to bankrupts, extend to, or bind the king.

Jon. 203; Cro. Car. 148; Salk. 162. pl. 1.

There are also statutes, which, as my Lord Hobart says, were made to put things in an orderly form, and to ease a sovereign of labour, but not to deprive him of power, which cannot be said to bind the king.

Hob. 126.

As the 27 H. 8, c. 27, which enacts that all grants concerning the court of augmentations should be under the seal of that court; yet grants under the great seal have been held good.

Dyer, 50 a.

So, the statute 25 H. 8, c. 21, which directs the manner of granting dis-

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pensations, though it says that dispensations shall not otherwise be granted; yet the king's power is not thereby restrained, but that by virtue of his prerogative he may grant them as before.

Hob. 146.

So, on the statute 28 H. 8, c. 15, for the trial of piracy by commission, it hath been held, that the trial may be, though the Chancellor does not nominate the commissioners, as that act appoints.

Dyer, 225; Hob. 146.

So, on the statute 9 E. 2, stat. 2, that the queen may make sheriffs without the judges.

Dyer, 303.

So, on 31 H. 6, c. 5, the office of alnage was granted by the queen, without the bill of the treasurer; and held good.

Hob. 146.

By a private act of parliament, 1 Jac. 2, the parish of St. James was taken out of the parish of St. Martin, and made an independent parish; and it was provided by the statute, that Dr. Tenison, the then vicar of St. Martin's, should be the first rector of St. James's parish; and that the patronage of the advowson should belong to the bishop of London and the Lord Jermin, *alternis vicibus*; the first rector, after vacation, by Dr. Tenison, to be presented by the bishop of London, and the next by the Lord Jermin and his heirs, and so on. Dr. Tenison was promoted to the bishopric of Lincoln, by which the church of St. James became void; and it was adjudged, that although it was by the statute expressly appointed, that the bishop of London should present upon the avoidance, yet the statute designed only to direct the methods and turns between the patrons, and not to exclude the king of his prerogative; and although this was a church newly erected, yet the king having the prerogative to present to all churches where the incumbent is promoted, shall have it in this church when it is erected.

Show. P. C. 164; 4 Mod. 200; 2 Salk. 540, pl. 2; Show. R. 413, 441, 493; 3 Lev. 377, 382; Ld. Raym. 23, S. C.; Lev. Ent. 344; Comb. 205, 300, 301; Carth. 313; 2 Salk. 559, pl. 2; Holt, 585, pl. 1, between the Queen, and Bishop of London, and Dr. Bird

5. *That no Laches can be imputed to him; and therein, of the Maxim, Nullum Tempus occurrit Regi.*

From the presumption that the king is daily employed in the weighty and public affairs of government, it hath become an established rule at common law, that no laches shall be imputed to him, nor is he in any way to suffer in his interests, which are certain and permanent; and this his privilege, *quod nullum tempus occurrit regi*, (a) has been confirmed by the statute *de prerogativa regis*.

Stamf. Prerog. 32, 33; Plow. 143; 7 Co. 28; Jon. 79; Hard. 24. (a) *Vigilantibus et non dormientibus jura subveniunt*, is a rule for the subject; but *nullum tempus occurrit regi*, is the king's plea; for there is no reason that he should suffer by the negligence of his officers, or by their compacts or combinations with the adverse party. Hob. 347. β Laches are not imputable to the government. *United States v. Nicholl*, 12 Wheat. 505; *Locke v. Postmaster-General*, 3 Mason, 446; *United States v. Kirkpatrick*, 9 Wheat. 720; *Dox v. Postmaster-General*, 1 Peters, 325; and see *Martin v. Commonwealth*, 1 Mass. T. R. 347. β

Hence it was held, that if the king's villein had purchased land, and aliened before entry by the king, yet, upon office found, the king might

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have entered, *quia nullum tempus occurrit regi*; though it was otherwise in the case of a common person.

Lit. § 178; Co. Lit. 118 a.

So, in a writ of right of advowson brought by the king, the tenant shall not tender the *di mark*, because *nullum tempus occurrit regi*; and therefore the king shall allege, that he or his progenitor was seised, without showing any time.

Co. Lit. 294.

So, an action of account lay at common law against the executors or administrators of the king's debtor or receiver; for being supposed busied and employed in the weighty affairs of the kingdom, it was not thought reasonable that he should suffer in his treasure by an omission occasioned perhaps by such his attendance.

Co. Lit. 90 b.

For this reason it is that there can be no occupant against the king: so that if the king grants land to A for the life of B, and B dies, no man by his entry can gain himself a title against the king; though it was otherwise in the case of a common person.

Co. Lit. 41 b.

So, there can be no tenant at sufferance against the king; but he who holdeth over is an intruder, because no laches can be imputed to the king for not entering.

Co. Lit. 57.

Therefore if the king be seised in fee of the manor of B, and a stranger erect a shop in a vacant plot of it, and take the profit of it without paying any rent to the king; and after the king grant over the manor in fee, and the stranger continue in the shop and occupy it as before, this is no disseisin; for the first entry of the stranger was no disseisin, but an intrusion on the king's possession; for that the king's title appearing on record, the entry *in pais*, which is not an act of equal notoriety, will not divest it out of him: if then the king is not disseised, his conveyance of the freehold is good, and the grantee is seised by virtue of it; and, consequently, cannot be said to be disseised by the stranger who has made no entry on him after the king's conveyance, but only continued the old interest which he had before the grant; and so remains an intruder still, and liable to an action of trespass or ejectment for it.

Bro. tit. *Disseisin*, (4); Hob. 322; Roll. Abr. 659; *Stokes v. Dawes*, 4 Mason, 268. *g* {See 2 Johns. Rep. 83, *Jackson v. Winslow*.}

A person cannot be indicted on the statutes against forcible entries for entering into the king's possession, because he cannot be disseised.

Co. 69; 10 Co. 112; Dalt. Just. 303.

A descent cast is no plea against the king, nor does it take away his right of entry.

Plow. 243 a; 2 Leon. 31.

If the king's goods become wreck, the lord of the manor cannot take them, but the king may claim them after the year and the day; for this reason, that he is supposed employed in the public affairs, and therefore no lapse of time shall injure him.

2 Inst. 168; Plow. 243.

For this reason the lord of the manor cannot take the king's beasts as

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strays; as also that this privilege of waifs and strays is derived from the crown, and cannot be supposed to extend farther than a liberty to take the goods and cattle of a common person.

49 E. 3, 4; Kitchen, 81.

If a grant be made to the king of the next avoidance of a living, and a stranger upon the death of the then incumbent present, and his presentee continue in six months, and die, yet the king may present another, *quia nullum tempus occurrit regi*. So, if a grant had been made to the king of all such presentments as should happen within twenty years, and in the twenty years there happen ten presentments which are filled up by a stranger, yet the king shall present to them over again.

Plow. 243 a.

If the king be patron of a church, and he omit to present within six months, the ordinary cannot present for the lapse, but is only to sequester the profits, and serve the cure till the king thinks proper to present; but if in this case the ordinary collate his clerk, and afterwards the king present, the clerk so collated cannot be turned out without a *quare impedit*.

Bro. title *Presentment*, (24); Comp. Incumb. 118.

If the king presents to a church, and his clerk is admitted and instituted, yet the king may before induction repeal and revoke his presentation; and it is held in this case, that the presenting another is a repeal in law, without any other notice to the ordinary. (a)

7 E. 4, 32; Dyer, 290, 327, 360. (a) [But to free the second presentation of all suspicion of being obtained by fraud in deceit of the king, it is proper that it should make express mention of the first presentation. Gibs. 795; Wats. c. 20.]

So where a title by lapse comes to the king, if the king doth present, and his presentee is instituted, yet the king may revoke his presentation, and so null the institution at any time before his clerk is inducted; or, if his clerk be instituted upon such title, and die before his induction, the king may present another, his turn not being served by the institution only of his clerk.

Leon. 156, *Wright v. Bishop of Norwich*.

But, though the king may remove the patron's or stranger's clerk that comes in upon his lapse, yet, if such clerk happens to (b) die incumbent of the church before the king doth present, the king hath lost the advantage of the lapse, and shall not present afterwards, or remove the patron's second presentee, because the king is to have but one turn, and that the next; and if the law should be otherwise, the king, by suffering divers usurpations upon his lapse, might even disinherit the very patron: and the rule *nullum tempus occurrit regi* is not to take place where the king is limited to a time certain.

7 Co. 28; Owen, 2; And. 148; Cro. Eliz. 44; Cro. Ja. 53, 216; Hetley, 125; Buls. 28; Moor, 269; Fitzg. 30. (b) Or, if the church becomes void by resignation, or deprivation, unless such resignation were by fraud or covin. Cro. Ja. 216; Owen, 89; 4 Leon. Case 351.*—*By stat. 9 G. 3, c. 16, (which is called the *Nullum tempus* act, and was brought into parliament by Sir George Saville,) the king shall not sue, &c., any person, &c., for any lands, &c., except liberties and franchises, or any title which has not first accrued within sixty years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *insuper* of record, and the subject shall quietly enjoy against the king and all claiming under him, by patent, &c.—This extends not to estates in reversion, or remainder, or limited estates.—These lands shall be held on the usual tenures, &c.—Usual fee-farm rents confirmed.—Putting in charge, standing *insuper*, &c., good only when on verdict, demurrer, or hearing, the lands, &c., have been given, adjudged, or decreed to

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the king. [And prescription is now pleadable against the crown even in the case of franchises and offices; for by stat. 32 Geo. 3, c. 58, six years' possession of a corporate office, gives the corporator a prescriptive title upon an information in the nature of a *quo warranto*, exhibited by the attorney-general or other officer on the behalf of the crown, by virtue of any royal prerogative, or otherwise. Neither is it competent to the crown to question any derivative title, where the person from whom it is derived was in exercise *de facto* of the office of franchise, in virtue of which he communicated the title for a like period of six years.] ||The above statute 9 Geo. 3, c. 16, does not give a title to the first wrongful possessor, but only bars the remedy of the crown against them, after sixty years continuing adverse possession. *Goodtitle v. Baldwin*, 11 East, 488. *Qu.* Whether the act applies to advowsons? 1 Ja. and W. 159.||

||If a bill of exchange be taken under an extent before it is due, and the party holding it on behalf of the crown neglect to present it for payment in due time, the drawer and endorser are not discharged; for no laches are imputed to the crown.

West on Extent, 29, 30, (1st ed.)|| That the statute of limitations does not run against the king, see *anté*, p. 94.

7. Of his Prerogative in his Suits and Proceedings in Courts of Justice.

[The king, though the chief and head of the kingdom, may redress any injuries he may receive from his subjects by such usual common law actions as are consistent with the royal prerogative and dignity. He may too sue in Chancery for a matter in equity.

Thel. Dig. l. 1, c. 3; 3 *Inst.* 136; 1 *Roll. Abr.* 373.

A declaration for the king ought regularly to be in the name of his attorney-general; though where it was in the name of the king himself, viz., *coram domino rege venit dominus rex*, it was, upon demurrer, for this cause adjudged good.

2 *Lev.* 82.

||INQUESTS OF OFFICE.|| But the more effectual means of asserting the rights of the crown, and redressing its injuries, are those which are obtained by the prerogative modes of process. Such is that by inquisition or inquest of office: which is an inquiry made by the king's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ sent to them for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number; being either twelve, or less, or more.

2 *Bl. Com.* 258.

Stamford lays it down, that in all cases where a subject shall not have possession, in deed or in law, without entry, the king will not be entitled without office found, or other matter of record.

Stamf. Pr. 55 b. ¶ See *Fairfax v. Hunter*, 7 *Cranch*, 603; *Crawford v. Commonwealth*, 1 *Watts*, 480; *Jackson ex dem. Culverhouse v. Beach*, 2 *Johns. Ch.* 399; *Jackson v. Lunn*, 3 *Johns. Ch.* 120; *Fire Department of New York v. Kipp*, 10 *Wend.* 266; *People v. Brown*, 1 *Cain.* 416; *Vaux v. Nesbitt*, 1 *McCord*, *Ch.* 352; *Craig v. Radfield*, 3 *Wheat.* 594.¶

As, if the king's tenant aliens in mortmain, or without license, the king's title must be found by office.

Stamf. Pr. 55 b.

So, if the king claims upon a forfeiture, or a condition (a) broken.

Sembl. Lev. 1 *R. Cro. Car.* 173; *Sir W. Jon.* 78, 217. (a) *Sav.* 70; 2 *Ro.* 215; {1 *Cain.* 416, *The People v. Brown.*}

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So, if the king claims the lands of an idiot, lunatic, &c., the person ought to be found an idiot, &c., by office.

Stamf. *ubi supra*.

So, if he claims the year, day, and waste, of a felon attainted, or the temporalities of a bishop for a contempt.

Stamf. *ubi supra*.

So, if he claims a freehold or inheritance as forfeited for a contempt.

Sav. 8.

So, if he claims as forfeited to the crown, *choses en action*, which belonged to an alien enemy. And in such case, a peace before the inquisition taken discharges the forfeiture.

Attorney-general v. Wheeden, Park. 267; *β* Fairfax v. Hunter, 7 Cranch, 603; Slight v. Kane, 2 Johns. Ch. 236; Jackson ex dem. Culverhouse v. Beach, 2 Johns. Ch. 399; Hammersley v. Lambert, 2 Johns. Ch. 508; Johnson v. Harrison, Litt. Sel. Cas. 226; Crag v. Radford, 3 Wheat. 594.*g*

These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without ^{} which he in general can neither take nor part from any thing. For it is part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon, nor seize any man's possessions, upon bare surmises without the intervention of a jury. And although a defendant is now permitted to traverse these inquests,^(a) and therefore they are not conclusive evidence, yet, as the legislature has directed,^(b) that inquisitions shall be taken publicly and in an open place, and has empowered every one to give evidence openly before the inquest, the court will,^(c) in some cases, order reasonable notice to be given of the issuing of such commission.

3 Bl. Com. 259. ^{} See 1 Cain. 416, The People v. Brown. } (a) St. 2 & 3 E. 6, c. 8. (b) Stat. 34 E. 3, c. 13; 36 E. 3, c. 13; 23 H. 6, c. 16; 1 H. 8, c. 8; 3 H. 8, c. 2. (c) The King v. Daly, 1 Ves. 269. ^{} See Manning's Ex. Prac. 34, and 12 East, 96. ^{}

Where an estate is given to an alien, or in trust for an alien, though such estate doth not actually vest in the king, until an office is found, yet he hath, before office found, such a right to it as will entitle him to the assistance of a court of equity to enforce a discovery of the fact of alienage.

Attorney-general v. Duplessis, Park. 144. ^{} By 47 G. 3, sess. 2, c. 24, in all cases in which the king becomes entitled to lands by escheat, or by forfeiture, or by reason that the same had been purchased in trust for an alien, his majesty, by warrant under the sign manual, may direct the execution of the trusts, and make grants of the lands to trustees for the purpose of executing the same; and see 7 Ves. 71, and the form of the warrant under sign manual, Chitt. on Prerog. p. 236. ^{}

If the office be found against the king, a *melius inquirendum*, on farther inquiry under the former commission, may be awarded. But in good discretion no *melius inquirendum* shall be awarded in such case, without sight of some record, or other pregnant matter for the king, to show the former was mistaken. And by pregnant matter for the king is meant matter pregnant with evidence of the king's right.

Stoughter's case, 8 Co. 168; Knight *ex parte* Duplessis, 2 Ves. 555. The *metus inquirendum* is grantable only on the part of the crown, and is given, because the crown cannot traverse, as the subject can. 3 Atk. 6. ^{} See Mann. Ex. Prac. 22. ^{}

But, if the *melius inquirendum* be found against the king, he is thereby precluded from having another *melius inquirendum*; for if this were allowed it would lead to infinity, for by the same reason that he might have a second, he might have them without end. However, if the first writ of *melius inquirendum* were repugnant in itself, if it did not give authority to

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find such an office as was found, as, where the writ was to inquire, whether at the time of the death of a person who died in the reign of Queen Elizabeth, the manor of O was holden of the lord the king that now is, another writ of *melius inquirendum* may be awarded.

Stoughter's case, *ubi suprà*.

If the king's title be found to lands and tenements, the king shall be in possession by the office only, without seizure, if the possession be vacant, or if the title be found to a local office or of which continual profit may be taken.

Stamf. Pr. 53, 54; 9 Co. 95 b; 4 Co. 58 a.

But, if the king's title be found by office to an incorporeal inheritance, (as, an advowson, &c.,) the king shall not be in possession before seizure: or if the king, after office, presents, the defendant in a *quare impedit* may traverse the king's title without traversing the office.

9 Co. 95 b.

And in all cases where a common person is put to his action, there, upon an office found, the king is put to his *scire facias*; for an office entitles the king to an action only, and not to an entry. But, where a common person may enter or seize, there, an office without a *scire facias* shall suffice for the king.

9 Co. 26 b; Stamf. Pr. 55 a; {1 Cain. 416, *The People v. Brown.*}

If the king do not seize within a year and a day after office found, he ought to have a *scire facias* before seizure.

Stamf. Pr. 54 b.

But no office is necessary if the king's title appear by other matter of record.

Stamf. Pr. 56 a.

So, if a possession in law be cast upon the king, no office is necessary, but the king may seize without it. As, if the king has a title by descent in remainder or reverter; for the freehold is cast upon him by law. So, if he is entitled by escheat; or is entitled to the temporalities of a bishop in the time of vacation.

Stamf. Pr. 54 a; 4 Co. 58; Sav. 7; 9 Co. 95 b.

So, where the king ought to have chattels or profits of lands for a contempt, he may seize without office; as, upon an outlawry the goods of a prior alien. So, in the case of simony the king shall present without office. So, he shall nominate to an office void by st. 5 & 6 Ed. 6, c. 16.

Sav. 8; 2 Ventr. 270.

And by stat. 33 H. 8, c. 20, in case of attainder for high treason, the king shall have the forfeiture instantly, without any inquisition of office.

[[CROWN INFORMATIONS.]] Another prerogative process is an information, filed in the Exchequer by the attorney-general. This is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the crown. It differs from an information filed in the Court of King's Bench, in that *this* is instituted to redress a private wrong, by which the property of the crown is affected, *that* is calculated to punish some public wrong, or heinous misdemeanor in the defendant.

2 Bl. Com. 261. [[See Manning's Exch. Prac.]]

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The most usual informations are those of *intrusion* and *debt*; *intrusion*, for any trespass committed on the lands of the crown, as, by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and *debt*,^(a) upon any contract for moneys due to the king, or for any forfeiture due to the crown upon the breach of a penal statute.

¶(a) See Mann. Ex. Prac. b. iii. ch. 3; and as to informations for penalties on the custom acts, see 6 G. 4, c. 108, §§ 73, 74, 77, 78, 100, 84, 87, 98, 99.¶

There is also an information *in rem*, when any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title of the king. As anciently in the case of treasure-trove, wrecks, waifs, and estrays, seized by the king's officer for his use. Upon such seizure an information was filed in the Exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of crown. And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the hand of justice.

¶The District Court of the United States for the district where a seizure is made, (if made in the United States,) or if made without the United States, then the District Court of the district where the property is found carried, has exclusive original jurisdiction of an information *in rem* for an alleged forfeiture under the laws of the United States.

The *Merino v. The Constitution & others*, 9 Wheaton, 401. See Conkling's Treatise, (2 ed.) 139, and cases there cited; and see also *Commonwealth v. Messinger*, 4 Mass. 462; *Commonwealth v. Chenay*, 6 Mass. 347; *Same v. Waterborough*, 5 Mass. 257; *Cushing v. Hackett*, 10 Mass. 164; S. C. 11 Mass. 202.¶

An information of *intrusion* is in the nature of a trespass *quare clausum fregit*. It may be general therefore, that the king was seised of certain lands, without describing the particular species or quantity. So, on the other hand, it is sufficient for the defendant to plead only so much as shows that he has title to the possession; as where the defendant showed that she had a jointure of a third part, without answering to the residue; for by that she had the possession of the whole in common with the king.

Sav. 48. ¶See Mann. Ex. Prac. b. iii. ch. 2.¶ *Semb.* M. 370, 376. ¶To sustain an information for intrusion into the lands of the people, it is necessary that the people should be in the actual possession of the subject intruded on. The *People v. Brown*, 1 Cain. 416; and see *Brimmer v. Long Wharf*, 5 Pick. 131; *Attorney-general v. Parsons*, 1 Tyr. & Gr. 980; 5 Dowl. 165.¶

At common law, upon an information for *intrusion*, the king by his prerogative might put the defendant upon showing his title specially. And if he pleaded *not guilty*, he should be immediately put out of his possession: for that, regularly, the king's title appeareth of record, and therefore the defendant may take knowledge thereof, and the rather, for that in every information of *intrusion* it is specified of whose possession the lands, &c., were.

Dy. 238 b; 4 Inst. 116. *Not guilty* pleaded. Sav. 68.

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If the defendant shows an insufficient title in form, the attorney-general may demur; but if the attorney-general in such case do not demur, but join issue on a fact alleged, which is found against him, he shall not afterwards take advantage of the defect.

Dy. 238 b.

By st. 21 Jac. 1, c. 14, if the king, or those claiming under him, or those under whose title the king claims, have not been in possession, or received the profits within twenty years, the defendant may plead the general issue, and shall not be ousted of his possession, till the title be found or adjudged for the king.

If the plea allege several facts, the king by his prerogative may traverse them all, though a common person ought to traverse but one.

Sav. 19.

So if the plea allege a title, which avoids the possession in the king supposed by the information, the king needs not maintain the information, but may traverse the title alleged by the plea.

Sav. 61.

And it is sufficient, if the king by his replication traverses so much of the title as encounters the information, without answering the whole title alleged by the defendant: as, to an information for intrusion in the moiety of a manor, the defendant says, A was seised of the whole, and died seised, by which there was a descent to the defendant; it is sufficient to traverse *absque hoc*, that he died seised of such moiety.

Sav. 61.

After judgment in an information for *intrusion*, execution shall be sometimes by injunction; or it may be by *amoveas manum*: and thereupon every party to the information, or claiming under him, shall be removed from the possession. But a stranger to the information shall not be debarred of his entry; for no judgment of seisin is given, nor does an *habere facias seisinam* go.

Sav. 35; Hardr. 460, 462.]

As the king is the fountain of justice, and all courts of justice derive their authority from him, hence he is supposed to be always present in court; and therefore it hath become an established principle of law, that the king cannot be nonsuit in any action or information in which he is sole plaintiff.

Co. Lit. 139; Bro. *Nonsuit*, (68); Sav. 56. β The people cannot be nonsuited. The People v. Thurman, 3 Cowen, 16.]

But it seems that any informer *qui tam*, or plaintiff in a popular action, may be nonsuit, and thereby wholly determine the suit, as well in respect of the king as of himself.(a)

Co. Lit. 139; 2 Roll. R. 33, 136. (a) But the king may afterwards proceed for his share of the penalty in the usual way as if no such suit had been instituted, provided the prosecution is commenced in due time.

Also the king's attorney-general may enter a *nolle prosequi*, which has the effect of a nonsuit to any information or action brought by the king only.

Co. Lit. 139; Sid. 420; Salk. 21, pl. 11, like point, where it is said by the C. J., that the crown, notwithstanding a *nolle prosequi*, may award new process upon the same indictment. || See 6 G. 4, c. 108, § 101. || β A *nolle prosequi* does not amount to a retraxit, but simply an agreement not to proceed further in that suit as to the particular person or cause of action. Minor v. Mechanics' Bank of Alexandria, 1 Peters, 74; and see Commonwealth v. Wheeler, 2 Mass. Term R. 172; Snowhill v. Hillyou, 4 Halst.

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38; *Bates v. Jenkins*, 1 Ap. Bro. 26. When a nonsuit does amount to a retraxit—see 1 Hayw. 331, 2 Penning. 956.

In an information for extortion, issue was joined, and the day the jury were returned, the king sent a writing under his sign manual to Sir Thomas Fanshaw, clerk of the crown, to enter a cesser of prosecution: and Palmer, attorney-general, affirmed that the king may stay proceedings; yet notwithstanding the court proceeded to swear the jury, and said they were not to delay, for the great or little seal; whereupon the attorney entered a *nolle prosequi*.

Vent. 33, *The King v. Benson*.

No prosecutor upon an indictment (*a*) can enter a *nolle prosequi* without leave of the attorney-general.

Ld. Raym. 721. (*a*) That entering *nolle prosequi* upon indictment began in Charles the Second's time. 6 Mod. 262, *per* Holt, C. J.

It is a rule of the common law, that the king by his prerogative may sue in what court he pleases; and therefore may bring a writ of right or a *quare impedit* in the Court of King's Bench.

4 Inst. 17; Plow. 243; Roll. R. 290. [And in an information upon a statute the king's prerogative to lay it in any county cannot be taken away without express negative words in the statute. 4 Inst. 172; Cro. Car. 525; 2 Str. 749; Parker, 182. ¶ And see 6 G. 4, c. 108, § 78.]

β It is sufficient if the information set forth the offence so clearly as to bring it within the words of the statute upon which it is founded, and need not conclude *contra formam statuti*.

The Merino, the Constitution, and others, 9 Wheat. 391.

In general it is sufficient in an information on a penal statute to negative the exceptions in the enacting clause—exceptions in a proviso come by way of defence.

United States v. Hayward, 2 Gallis. 485.

If an information be defective, the defect is not cured by evidence of the facts omitted to be averred.

The Schooner Hoppit, 7 Cranch, 389; The Brig Caroline, 7 Cranch, 496.

An information *in rem* may be amended by leave of the court.

The Caroline, 7 Cranch, 496; 1 Gallis. C. C. 22; *Ibid*, 123; 8 Wheat. 380.

In an action for embezzling the king's goods, which was laid in the declaration to be in London, it was moved for the king, that the county might be changed; and the court held, the king might choose his county, and might waive that which he had seemed to have elected before, as he may waive his demurrer and join issue.

Vent. 17, *The King v. Webb*.

If a person be guilty of two capital offences, the king may elect which of them to try him on first; and accordingly, where two persons murdered the post-boy in Lincolnshire, and afterwards committed a robbery in Wilts, for which they were taken and in custody in Wilts; the attorney-general moved for a *habeas corpus* to the sheriff of Wilts, to deliver them to the sheriff of Lincoln, and another to the sheriff of Lincoln to receive them; which was granted; the court allowing the crown had such election.

Hil. 6 G. 2, in *B. R. Rex v. Hallam, &c.*

¶ REMOVAL OF REVENUE SUITS INTO EXCHEQUER. ¶ [Where the king's revenue is concerned in the event of a cause, it shall be removed from

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any other court where the action is brought into the office of Pleas of the Exchequer.

Lamb v. Gunman, Parker, 143.

Thus in an action between the duke of Cleveland's bailiff and some other persons of the town of Rye, upon a demand of prisage of wine, an issue was joined upon this question, whether the town of Rye was entitled by charter to be exempted from this claim of prisage? The king had a reversionary interest in this prisage, because it was granted to the duke of Cleveland in tail; and in respect of this interest it was holden, that the king had a right to desire that the cause might be removed into the Exchequer, and the cause was accordingly removed.

[Vide 3 Anstr. 852.]

Again, an action was brought against a Mr. Pennington, who was the collector at Bristol, for money had and received by him, and it appeared that the action was brought for money received by him on account of the duties on glass, whereupon the Court of Exchequer removed it, and ordered it to be tried in the Exchequer, and not in any other court; the question being, whether Mr. Pennington was entitled to retain that money so received as duties on glass or not?

Jan. 29, 1754; Anstr. 214.

So, an action brought by Mr. Baring against Sutlin, one of the principal officers in the port of London, in order to get back moneys which had been charged to him for duties upon some goods which he thought he was not liable to pay, was removed into the Court of Exchequer.

An. 1777, Anstr. 214.

So, in an earlier period, in the year 1702, two actions were removed. One was an action of trespass, the other of trover: one was for entering a ship and seizing goods for non-payment of duties, and the other was trover for the ship itself. Both these actions were removed; and the minute only says, "there being an information for the duties." Now an information for the duties is nothing more than the king's action of debt; and therefore there was nothing properly of prerogative in that, except merely the form of suing by information, instead of the common action of debt: but the ground of removal must have been, that a part of the question in those actions would be, whether the duties were payable or no. If the duties were payable, then it might follow that the party might have a right to enter the ship and look for the goods, and might have a right to stop the ship and the goods till the duties were paid. If no duties were payable this justification failed.

Anstr. 214. Per Eyre, C. B.

An action for trespass for taking goods by colour of a warrant to levy a penalty of 100*l.* forfeited by the plaintiff, he having been convicted on an information before the commissioners of excise, for not making due entries of teas sold by him, was removed into the Court of Exchequer, for that the action proposed to draw into question elsewhere that debt or forfeiture, wherein the king had an interest, a moiety thereof, as soon as it was fixed and vested by judgment, becoming a regular debt to the crown.

Cawthorne v. Campbell, Anstr. 205.

Again, an ejectment was brought in 1710, in the Court of King's Bench; and it was, as to part of it at least, for lands which were part of the queen's

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estate. There was an application to the Court of Exchequer to stay the proceedings, and the parties were heard upon it. The attorney-general attended, and after the hearing it was put off for a day or two; at length the entry is, that an injunction issued *pro dominâ reginâ*. So that the action was not removed, but simply an injunction went to stay proceedings. And the reason was, if the action had been removed the question could not have been tried, even in the Office of Pleas, because the queen's title cannot be tried in an ejectment. The queen was in possession; her hands must be removed by some other course of proceeding than an ejectment; and therefore it was fruitless to think of removing it, and it remained under an injunction. It may be said, that it might be as well left to the Queen's Bench to determine that the queen's lands could not be recovered in ejectment. To be sure they might if the prerogative of the queen had not been that the queen had a right to prevent that question from being discussed there.

Anstr. 215.

|| Where custom-house officers were served with a writ of *clausum fregit*, issuing out of the great sessions in Wales, for a supposed trespass in executing process on an information, the writ of *clausum fregit* was ordered to be removed into the Exchequer.

In re Kingsman, 1 Price, 206.||

§ Any suit or prosecution commenced in a state court against any officer of the United States or other person for or on account of any act done under the revenue laws of the United States, or under colour thereof, may be removed by the defendant, at any time before trial, to the Circuit Court of the United States for the district in which the defendant was served with process.

Act of Congress, March 2, 1833, c. 356, s. 3. As to the time and mode of removal, see Conkling's Treatise, 296, 2d ed.

If an officer of the revenue seize goods *without* probable cause, he is responsible for all the losses and injuries, however occasioned. If *with* probable cause, he is responsible only for injuries occasioned by ordinary neglect.

Burke v. Trevitt, 1 Mason, 96. As to what is "probable cause," see Murray v. The Charming Betsey, 2 Cranch, 64; Gelster v. Hoyt, 3 Wheat. 246; Locke v. United States, 7 Cranch, 339; The Palmyra, 12 Wheat. 1; The Glaze, 1 Mason, 24; Munns v. Dupont, 3 Wash. C. C. R. 31; Wood v. United States, 16 Peters, 342. §

|| KING'S PREROGATIVE IN PLEADINGS, &c. ||—The king may amend his declaration in the same term, but not in another term.

Vaugh. 65; R. 13; E. 4, 8 a. || An information may be amended at any time on payment of costs. 3 Anst. 714; Saville, 3, pl. 7. || § The Caroline, 7 Cranch, 496; The Edward, 1 Wheat. 261; Anonymous, 1 Gallis. 22; The Mary Ann, 8 Wheat. 380. §

The king may waive his replication in another term, when the defendant is ready to rejoin.

2 Ro. 41.

And in an information he may waive his demurrer to the defendant's plea, and reply to issue.

Cro. Car. 347; Vaugh. 65; Hardr. 455, pl. 322 a.

A defendant cannot waive his plea, and plead the general issue, without the consent of the attorney-general.

Cro. Car. 347.

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But after issue joined, the king may in the same term waive the issue, and demur or take another issue.

Stamf. 65 b; Vaugh. 65; Hardr. 459, pl. 322 a; 13 E. 4, 8 a.

But if the king joins issue upon his title, he cannot afterwards waive it to traverse the title of the defendant.

Semb. Vaugh. 64; 1 Mod. 276; R. 13 E. 4, 8 a.

Where the king's title appears to be no more than a bare suggestion, the king can no more than a common person, (and for the same reasons,) forsake his own title, and endeavour only the destroying of the defendant's title; for the weakening of the defendant's title without more, can no more make a good title to the king than it can to a common person.

Vaugh. 62. ||See Mann. Ex. Prac. 110, 176.||

Where a defendant pleads a title against the crown, and the attorney-general will not reply or demur in a reasonable time, the court will order judgment to be entered for the defendant, unless the attorney-general, upon being attended, will either enter a *nolle prosequi* or proceed.

Rex v. Musters, Parker, 50.

If upon a *scire facias* out of the Petty-bag Office to repeal letters-patent, one defendant pleads to issue, and as to the other demurrer is joined, the king may bring on either the trial or the demurrer first as he pleases.

Rex v. Hare, 1 Stra. 266.

In the Exchequer no *nisi prius* shall be granted where the king is a party unless the attorney-general consents to it.

Sav. 2.

So, the trial shall be at *nisi prius*, and not in bank, if the king requires it, though it be upon an indictment removed by *certiorari*.

Cro. Car. 348.

||Where the crown is interested, the attorney-general may demand a trial at bar as of right.

Rowe v. Brenton, 8 Barn. & C. 737.||

If a title appears upon record for the king, the court *ex-officio* shall adjudge it for him.

Cro. Car. 590. {A court of law cannot give judgment, nor can the Court of Chancery decree, against the title of the crown appearing on the record, though no claim is made by the attorney-general. 3 Ves. J. 424, Barclay v. Russell.}

If the attorney-general confesses the plea of the party, and thereupon he is discharged, where the plea is no bar in law, the king shall not be bound; for though a confession by the attorney-general in a matter of fact binds the king, yet it is not so in a matter of law.

Semb. Hardr. 170.

It seems questionable, whether, after a *distringas* and a jury returned upon it, the attorney-general can at his pleasure stay trial.

Lake's case, 4 Leon. 32.

He cannot waive the issue after verdict.

Hardr. 455.

The king cannot be sued by his subjects by writ, for he cannot issue a command to himself; though it is said in some books(a) that before the

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time of Edward the First, the king might be sued as a common person, the form being, "*Præcipe Henrico Regi Angliæ.*"

Thel. Dig. l. 4, c. 1. (a) 22 E. 3, 3 b, pl. 25; 24 E. 3, 55 b, pl. 40; 43 E. 3, 22. *Sed vide* Stamf. Pr. Reg. 42.

§ The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

9 Amendment to Constitution of United States. See *Chisholm v. State of Georgia*, 2 Dall. 419; *Hollingsworth v. State of Virginia*, 3 Dall. 378. This provision in the Constitution does not apply to suits by a state against another state. See *State of New Jersey v. State of New York*, 3 Peters, 461, 5 Peters, 284; *Rhode Island v. Massachusetts*, 12 Peters, 657.

Neither can any one vouch the king, for that is in nature of an action. So, if a fine is to be levied by the king of lands, it must be by render, and not by writ of covenant.

H. 9, H. 6, 3 & 4; Thel. Dig. l. 4, c. 2, § 2; Cro. Car. 96, 97.

|| PETITION DE DROIT—MONSTRANS DE DROIT—TRAVERSE OF OFFICE. ||
The common law methods of obtaining redress or restitution from the crown of either real or personal property, are, 1. By *petition de droit*, or petition of right. 2. By *monstrans de droit*, manifestation or plea of right; both of which may be preferred or prosecuted either in the Chancery or Exchequer.

3 Bl. Com. 256. Though Sir W. Blackstone calls the *Monstrans de droit* a common law remedy, yet Stamford's opinion is expressly, that the *monstrans de droit* was given by 36 E. 3, and did not lie at common law, and in Anderson's report of the Sadler's case (1 And. 181) it is affirmed by the court, that the *traverse* and *monstrans de droit* are both given by that statute. And of the same opinion is the Lord Keeper Somers in his argument in the Banker's case. 11 St. Tr. 154.—It is said, that at this day a *monstrans de droit* lies only in the Chancery or Exchequer, except in a special case, as in Lady Broughton's case, where the *monstrans de droit* was brought in B. R. because the record of the conviction and seizure was there. Skin. 610.—A suit by petition may be to the king in Parliament, or, according to Comyns, (Dig. tit. *Prerogative*, (D) 80.) in any other court. If it be in parliament, it may be established by act of parliament, or pursued as in other cases. Stamf. Pr. 72 b. || See *Keilw.* 154; *Mann. Ex. Prac.* 84, 86, (2d ed.) ||

There is also a remedy given by statute 2 E. 6, c. 8, and that is by way of traverse to the king's title.

At common law, when the king was seised of any estate of inheritance or freehold by any matter of record, were his title by matter of record judicial, as attainder; ministerial, as by office; or by conveyance of record, as by fine, deed enrolled, &c.; or by matter in fact, and found by office of record on oath, as by alienation in mortmain, purchase by alien born, &c., he who had right was put to his petition of right in nature of a real action to be restored to his freehold and inheritance.

4 Co. 55 a.

And this method of proceeding by petition is proper, where the king seizes the goods or lands of a subject without due order of law, or enters into the lands of another without title or office found.

Stamf. Pr. 72 a, b.

So, if he does not pay an annuity granted by him, or issuing out of lands in his hands; or does not pay a debt, wages, &c.

Lord Somers's Argument, 11 St. Tr. 154, 155.

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So, if the king be entitled by a record not traversable, as by a recovery in the king's court, by assent, without title; or by an erroneous judgment; for error shall not be allowed without a petition.

Stamf. Pr. 74 a.

And in all cases where the entry would be tolled, if the land were in the hands of a common person; or where the party controverts the king's title, the proceeding is by petition.

Stamf. Pr. 74 b. *Per Holt*, 608.

And where a traverse or *monstrans de droit* does not lie, suit ought to be to the king by petition: as, if the king be entitled by double matter of record. But if A be attainted in B. R., and it be found by inquisition in the Exchequer that he was seised of the manor of D, this will not be in judgment of law a double matter of record, so as to force the owner of the land to his petition, the record of the attainder not being in the same court with the inquisition.

Stamf. Pr. 74 a; Bro. tit. *Petition*, pl. 35, 36; Lane, 58.

Where an estate is forfeited by attainder, &c., none can sue by petition before office found, for, till office, the estate is not vested in the king.

Sir W. Jon. 78. § See *Crawford v. The Commonwealth*, 1 Watts, 480; *Hunter's Lessee v. Fairfax*, 7 Cranch, 619; *Craig v. Radford*, 3 Wheaton, 343; *Smith v. The State of Maryland*, 6 Cranch, 286; *Fire Department v. Kipp*, 10 Wendell, 266; *Johnson &c. v. Beach*, 2 Johns. Ch. 399; *Vaux v. Nesbitt*, 1 M'Cord, Ch. 352; *Craig v. Radford*, 3 Wheat. 594. §

The party must be careful to state truly in the petition the whole title of the king, else the petition will abate. For upon an issue in the petition found against the king, he shall be concluded for ever to claim by any of the points contained in the petition.

Finch's L. 256; Lord Somers's Arg. 11 St. Tr. 149.

The manner of answering petitions, it should seem, was formerly very various: which variety did sometimes arise from the conclusion of the party's petition, sometimes from the nature of the thing, and sometimes from favour to the party; and according as the endorsement was, the party was sent into the Chancery, or the other courts. If the endorsement is general, *soit droit fait al partie*, which is now the usual endorsement, the petition must be delivered to the Chancellor of England, and then a commission (a) issues to inquire of the truth of the suggestion; and that being found, so that there is a record for him, thus warranted, he is let in to interplead with the king: but, if the endorsement is special, then the proceeding is to be according to the endorsement in any other court. The case Mich. 10 H. 4, 4, is full as to this matter. The king recovers in a *quare impedit* by default against one who was never summoned, the party cannot have a writ of *deceit* without a petition. If then, says the book, he conclude his petition generally, *que le roy lui face droit*, and the answer be general, it must go into the Chancery, that the right may be inquired of by commission; and upon the inquest found, an original writ must go directed to the justices to examine the *deceit*; otherwise the justices, before whom the suit was, cannot meddle: but, if he conclude his petition especially, *that it may please his highness to command his justices to proceed to the examination*, and the endorsement be accordingly, *that will give the justices a jurisdiction*.

(a) This not necessary if the attorney-general confesses the suggestion. Skin. 608. Fitzh. tit. *Traverse*, pl. 51; Bro. tit. *Petition*, pl. 34.

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But where no office is found to entitle the king, the party may pursue a petition without an inquisition for him.

Melville's case, Moor, 639.

After a commission whereon a title is found for the party, before he can interplead with the king, there ought to be a writ to inquire of the king's title; and this, in all cases, where land is in the king's hands, or granted to another: and in this last case there should be a *scire facias* also against the patentee.

Stamf. Pr. 73 b.

Where a petition disaffirms the king's possession, there ought to be four writs of search directed to the treasurer and chamberlains of the Exchequer; but writs of search are not necessary where the petition affirms the king's possession; as upon a petition of right of dower.

Menville's case, Moor, 639. The writs of search issue upon the suggestion of the attorney-general, that there are in the Treasury several records, charters, deeds, muniments, &c., touching the king's right to the estate in question. Rast. Entr. 462 a.

Where the right of the party, as well as the right of the crown, appeared upon the same record, or the right of the party appeared by another record of as high a nature as that upon which the right of the crown appeared, the party was entitled by the common law to have a *monstrans de droit*. Thus, if a conveyance be to the king, upon condition to be void, if a fine be levied, or a recognisance given, or other matter performed, which must be upon record; he who has made the conveyance, levied the fine, given the recognisance, &c., may have a *monstrans de droit* by the common law; for the recognisance appears by a record as high as the conveyance. So he may, though the performance of the condition be not upon record, if it be afterwards found by office.

4 Co. 55 a, b.

So, if the title of the party be not found by the same or another record, whereupon he sues to the king by petition, and an inquisition is granted upon the petition finding his right, he afterwards may have a *monstrans de droit* by the common law.

4 Co. 57 b.

But, if the title of the party did not appear by the same record, which found a title for the king, or by a record of as high a nature, he could not have a *monstrans de droit* by the common law, but was forced to sue by petition. And this, though it appeared by the return of the sheriff, mayor, &c., to a *diem clausit extremum*, or other writ; for the return, though filed of record, is not so high as an office found *per sacramentum proborum hominum*.

4 Co. 55 b.

But, by stat. 36 E. 3, c. 13, where lands are seised by inquest of office before the escheator, and any man will make claim to them, the escheator shall send the inquest, within a month, into the Chancery, and a writ shall be delivered to him to certify the cause of seizure; and then the claimant shall be heard to traverse the office, and show his right. And therefore, where an office is found, which is traversable by that statute, the party may have a *monstrans de droit*; and this, though he be not put out of possession by the office, or, though the king be entitled by matter *in pais* found by record; as, by alienation in mortmain, &c.

4 Co. 59 a.

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So, if the king be entitled by office, or matter of record, which is traversable, but, being true, cannot be traversed, the party may have a *monstrans de droit*.

Stamf. Pr. 71 a.

But, where the king was entitled by double matter of record, the party could not have a *monstrans de droit* till it was given by the statute of 2 & 3 E. 6, c. 8.

The *monstrans de droit* recites the inquisition found for the king, and then shows the right of the party, which it offers to verify, and concludes with praying judgment, and an *amoveas manum*, and restitution of the land and tenements, and of the profits from the time of taking the inquisition.

Co. Entr. 402.

If the attorney-general confesses the title of the party, or, if he replies, and afterwards confesses, or, if it be found for the party after verdict, or upon demurrer, the judgment is *quod manus domini regis amoveantur*, and that the party be restored to the possession of the premises, with the appurtenances, together with the mesne profits from the time of the caption of the inquisition not answered to the crown, *salvo jure domini regis*; which last clause is always added to judgments against the king, and is expressly required by stat. 2 & 3 E. 6, c. 8. And by this judgment the king is instantly out of possession.

Co. Entr. 404, 406 b; Finch's L. 460; 2 Inst. 695; Finch's L. 459. The *amoveas manus* is the end of every suit, where a man comes to interplead with the king; for without that judgment, the land will still remain in the king's possession. Keilw. 158 a.

But the party cannot have judgment in a *monstrans de droit*, though the king have no title, unless he can show a title in himself.

2 Salk. 448; {Vaughan, 64.}

It is said, that the party who sues a *monstrans de droit* is a plaintiff, and may be nonsuit, 4 H. 6, 11, and if he fails in his own title, he is gone as effectually as if he were nonsuit, and no judgment need be given for the crown; and accordingly in *The Queen v. Mason*, the judgment was, *quod nil capiat per billam suam de monstratione prædictâ*.

2 Salk. 448. If the party suing the *monstrans de droit* may be nonsuited, the whole of this proceeding is quite anomalous. For the party certainly appears upon the record in the character of the defendant; he shows his right in the form of a plea; the attorney-general replies; and the other party when he takes the issue *ponit se super patriam*, as on the other hand the attorney-general in that case *petit quod inquiretur per patriam*. And Lord Somers in his argument, 11 St. Tr. 154, says, "I take it to be generally true, that in all cases where the subject is in nature of a *plaintiff*, to recover any thing from the king, his only remedy at common law, is to sue by *petition* to the person of the king. I say, when the subject comes as a *plaintiff*. For, when upon a title found for the king by *office*, the subject comes in to traverse the king's title, or to show his own right, he comes in in the nature of a *defendant*; and is admitted to interplead in that case with the king in defence of his title, which otherwise would be defeated by finding the *office*." And in another part he says explicitly—"In this sort of proceeding (*viz.* a *monstrans de droit*) the subject is in the nature of a *defendant*, and comes in and pleads to a title found for the king." And note farther, that the case referred to from the Year-book, (4 H. 6, 11,) is of a *traverse* to an inquisition. Now it has been expressly determined in *The King v. Roberts*, 2 Str. 1208, that the traverser of an inquisition for the king is properly to be considered as a defendant, who opposes the title found for the crown, without setting up any title in himself, as he might do in a petition of right. And indeed it would be absurd, say the court, to construe the liberty of traversing, to give a power of delaying the crown; which must be, if the party is considered as having the common right of a *plaintiff*. The court therefore held in that case, that the record was well made up and carried down for trial by the prosecutor of the commission. β And see 3 Johns. Rep. 1, *The People v. Cutting*; γ

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The proceedings upon a *monstrans de droit* are had in the Petty-bag Office in the Court of Chancery, and are not enrolled as in other courts, but remain upon files in that office.

Co. Entr. 405.

At common law, where the king was entitled by office, though untruly found, the party could not have a traverse to the office, nor could he avoid it without petition.

4 Co. 56 a; Stamp. Pr. 60 b; 13 E. 4, 8 a. *§* An inquest of office by the attorney-general, for lands escheated to the government by reason of alienage, is evidence of title in all cases, but not conclusive against any person who was not a tenant at the time of the inquest, or party or privy thereto. *Stokes v. Dawes*, 4 Mason, 268.*g*

Nor, where the king was entitled by any matter of record judicial or ministerial, conveyance of record, or matter of fact found by office of record, notwithstanding the office concerned only a chattel real.

4 Co. 55 a, 56 a.

But, where the office did not give a seisin or possession to the king, but only entitled him to an action for the recovery of the land, in such action the party might traverse the office by the common law. As, if an office finds, that the king's tenant has ceased for two years, or done waste, or made a feoffment by collusion, &c., whereby the king is entitled only to his action of *scire facias* against his tenant, in which the tenant may traverse the *cesser*, waste, collusion, &c.

4 Co. 56 b.

So, by the common law, an office or inquisition for goods and chattels personal might be traversed. As if A be attainted of treason, or felony, or outlawed in debt, trespass, &c., and an inquisition find that he had such goods at the time of the felony or outlawry, a stranger, who has the property, may traverse it.

Stamf. Pr. 60 a; 13 E. 4, 8 a; 4 E. 4, 24 a.

So, offices of instruction only were traversable by the common law, as all offices under the Exchequer seal.

Sav. 130. There were two sorts of offices, one of *intituling*, and another of *instruction*. The office of *intituling* was always by inquisition found, by commission under the broad seal, for the king could not take but by matter of record; and this was a part of the liberty of England, that the king's officers might not enter upon other men's possessions till the jury had found the king's title; therefore, where the king's title appeared on record, his officers might enter without any office found; as, where the lands are held of the crown, and the tenant dies without heirs, the officers of the king may enter, because the tenure whereby the king's title appears is upon record; so, by the common law, where lands belong to nobody, the king's officers may enter, because by the law the land is in the crown; for the law entitles the king, where the property is in no man: but if anybody else were in possession, the lands cannot be divested without matter of record. But notwithstanding, where the king is entitled by matter of record, there is no need of an office to entitle him; yet there were always offices of *instruction* found, (that is to say,) the escheator was bound, *virtute officii*, to hold an inquest *by way of instruction*, and to return the same into the Exchequer; and this is by 34 E. 3, c. 13, as likewise 10 H. 6, c. 7; and by that last statute such offices are to be returned either into the Chancery or Exchequer, within one month after the taking of the same, under the penalty of 40*l.*: and by 1 H. 8, c. 8, the escheators were to sit in open places, and the sheriffs were to return jurors, and the inquisition was to be taken by indenture, whereof one part was to remain with the foreman of the jury, and the other part was to be returned into the Chancery or Exchequer, within one month; and from the Chancery it was to be transcribed into the Exchequer. The reason why it was returned into Chancery, was, because that was a court that was always open, since the Chancellor was always an itinerant with the prince. The office of *instruction* might either be taken by the escheator, *virtute officii*, or it might be taken *by writ* from the Court of Exche

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quer, and both were equally offices of *instruction*: but by 33 H. 8, c. 22, the escheator was not to sit *virtute officii*, where the lands were 5*l.* *per annum* or above, on pain of 5*l.*, which statute was made to hinder escheators from seizing lands by virtue of their office, without a writ directed out of the Chancery or Exchequer; and it seems, that the office to *entitle* the crown must be by writ out of Chancery. But if the freehold was cast upon the crown, though the escheator could not seize, *virtute officii*, after the statute; yet he might have a writ of seizure from the Exchequer, and thereby take an office of instruction; because such lands, being in the king without office, were within the survey of the Court of Exchequer.—These offices of *instruction* settled the annual value of the lands, and by that value the escheators accounted; unless the court, upon putting them up to auction, found any person that would give more for the lands, and then they let them by lease under the Exchequer seal. Gilb. Exchq. 109.

By stat. 34 E. 3, c. 14, where lands or tenements were seized into the king's hands by office of the escheator, on account of alienation without license, or the tenant *in capite* dying, and leaving his heir within age, it was to be returned into Chancery; and if the tenant would *traverse the office* so taken by the king's commands, and say, that the lands were not seizable, he was to be received so to do, and process was to be sent into the King's Bench to try it according to law.

But this act extended only to offices found *virtute brevis*, or *commissionis*; for the words are "taken by the king's command," so that an office taken *virtute officii* was out of the act.

4 Co. 57 a.

It also extended only to the two cases above mentioned of alienation without license and ward.

And farther, it extended only to a *traverse*, and not to a *monstrans de droit*, by which, although on the *traverse* the issue was found for the party, yet the judges could not proceed to judgment without a writ *de procedendo ad judicium*.

To remedy these inconveniences the statute of 36 E. 3, c. 13, was made, by which it is provided, that if land be seized by an office before the escheator returned into Chancery, any one, who challenges the land seized, shall be heard without delay to *traverse the office*, or otherwise to show his right, and from thence sent before the king to make a final discussion without attending other commandment.

{See 6 Ves. J. 809, *Ex parte Webster*.}

This last statute allows a *traverse* to all offices found before the escheator, or before commissioners.

4 Co. 57 b; Stamf. Pr. 61 a.

And by stat. 8 H. 6, c. 16, it is extended to all aggrieved by the inquest, though not put out of possession by the escheator.

But, notwithstanding these statutes, persons were still liable to be precluded of their rights, by the untrue finding of offices. As, for instance, persons holding terms for years, or by copy of court-roll, were often put out of their possession by reason of inquisitions, or offices found before escheators, commissioners, and others, entitling the king to the wardship or custody of lands, or upon attainders for treason, felony, or otherwise; and this because such terms for years and interests in copyhold were not found: after which they had no remedy, during the king's possession, either by *traverse* or *monstrans de droit*, because such interests were only chattels in customary hold, and not freehold. In like manner persons having any rent, common, office, fee, or other profit *aprendre*, if such interest were not found in the office entitling the king, they had no remedy

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by traverse, or other speedy means, without great and excessive charges, during the king's right therein. To redress these hardships on the subject, it is declared by stat. 2 & 3 E. 6, c. 8, that all persons in the above cases shall enjoy their rights and interests, the same as if no office or inquisition had been found, or as they might if their interest had been regularly found at the same time in such inquisition or office. Remedy was given where a person was found untruly heir of the king's tenant, and the like. And where a person is untruly found lunatic, idiot, or dead, and in some other cases, it is enacted, that the party grieved shall have a traverse, and proceed to trial therein; and have like advantages as in other cases of traverse upon untrue inquisitions and offices. The same of untrue finding, where a person is attainted of treason, felony, or *præmunire*, the party grieved may have a traverse or *monstrans de droit*, without being driven to a petition of right. And in all traverses taken upon this act, it is directed, that the person pursuing his traverse shall sue out a writ of *scire facias*, one or more, as the case shall require, against such person as shall have an interest either by the king or by his patentee, in like manner as upon traverses and petitions in other cases, with like pleas to the defendants in the *scire facias*.

If a term for years is found and sold on an inquisition on an outlawry, a mortgagee not in possession shall be allowed to plead to the inquisition.

Rex v. Blunt, Bunb. 104. β As to traverse of inquisitions, see Bonsell v. Chancellor, 5 Whart. 371; Case of De Silver's estate, 5 Rawle, 111; Clark v. Caldwell, 6 Whart. 139; The People v. Cutting, 3 Johns. 1; Armstrong v. Short, 1 Ruff. 11; Stokes v. Dawes, 4 Mason, 268.g

||So also may a person with whom the extendee has deposited his deeds by way of equitable mortgage, or to whom he has contracted to sell.

6 Price 411; 7 Ves. 261.||

Upon outlawry, inquisition thereon returned, *levari* issued, and money levied, he who has a statute-merchant, and is in possession of the land, may, on motion, have time to plead to the outlawry and inquisition; and, on giving security, have the money in the sheriff's hands repaid to him.

Rex v. Toller, Bunb. 123.

Where on an inquisition a man was found possessed of a term *jure uxoris*, and after his death it was sold on a *venditioni exponas*, the widow was permitted to plead to the inquisition, though she had defended an ejectment brought by the purchaser, and filed a bill in Chancery.

Watts v. Robinson, Bunb. 220.

If a man traverses an inquisition, the usual course of the court is to take security to the value of two years' profits of the land, because in that time it is intended the right of the crown and party will be determined.

Per Baron Montague, Bunb. 25. ||See Mann. Ex. Prac. 93.||

To an inquisition on an extent on an outlawry, the defendant, as terre tenant, may plead, that the party outlawed is dead, without setting forth a special title; for, upon affidavit of the fact, the attorney-general usually allows the plea, there being after the party's death no title subsisting in the crown.

Rex v. Barnfield, Bunb. 102.

Where by office, or statute without office, a particular estate is vested in the king, he in reversion or remainder dependent upon that estate may,

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upon the determination of it, enter upon the king without traverse, or *amoveas manum*.

Linch v. Coote, 2 Salk. 469.

So, if it be found by inquisition that a parson outlawed in a personal action was seized of lands, which B claims, and the escheator take the profits by this false office; B may disturb him without a traverse.

Stamf. Pr. 67.]

(F) Of the King's Grants and Letters Patent: And herein,

1. *What Things the King may grant: And therein,*

1. Of grants arising from his Prerogative of Power, and which are inseparably annexed to the Crown.

FROM the great trust and confidence reposed in the king, and the high authority with which he is invested, the law hath inseparably annexed to the crown a power of granting and disposing of divers rights and privileges, which cannot be granted or established by any less authority. Of these there are some that have no existence till created, such as franchises, liberties, fairs, markets, hundreds, leets, parks, warrens, which the king (*a*) only by his prerogative can establish. (*b*)

Bro. Pat. 16; 2 Roll. Abr. 187; 9 Co. 25, 87; Co. Lit. 199; Godb. 254; Jenk. 79, 307. (*a*) And therefore a subject cannot build a castle or other place of defence without the king's license. Co. Lit. 5. (*b*) May be created by ordinance, as my Lord Hobart expresses. Hob. 15.

So, the king may grant *pontage* or *murage* to be taken by those who erect new bridges or walls; but the payment thereof shall continue no longer than the bridge remains useful, or the wall necessary for the defence of the subject.

Bro. Patent, 12; Noy, 176, Darcy v. Allen.

So, a grant of a ferry, and that every person going over shall pay a half-penny, is good, being for the public utility; and the payment is in consideration of the particular benefit.

13 H. 4, 14; Bro. Patent, 12. β In Pennsylvania, to enable a person to keep a ferry, he must either own the ground where the landing is made, or obtain the consent of the owner of the land for that purpose, and this although he is authorized by an act of the legislature to keep a ferry. Cooper v. Smith, 9 Serg. & R. 26; Chambers v. Furry, 1 Yeates, 167. But in North Carolina, the county court may grant a man the privilege of keeping a ferry, although he does not own the land on either side of the river. Raynor v. Dowdy, 1 Murph. 279. (But this case appears to have been overruled. See Pipkin v. Wym, 2 Dev. 402.) And see 2 Murph. 57. As to ferries in general, see Chess v. Manour, 3 Watts, 219; Bird v. Smith, 8 Watts, 434; The People v. Babcock, 11 Wend. 586; Stark v. McGowan, 1 Nott & M'C. 387; Almy v. Harris, 5 Johns. 175; Sanders v. Craig, 1 Marsh. 196; Givens v. Pollard, 3 Marsh. 321; 15 Pickering 243; 6 Paige. 554; 5 Johns. 175; 7 Pick. 344; 3 Bibb, 374; 4 Bibb, 309; 6 Ohio R. 166; 1 Blackf. 189, 405; 6 Mees. & W. 234; 5 Law Rep. 106. It is no violation of an exclusive right to keep a ferry, to carry persons across without pay. Chapelle v. Wells, 4 New Ser. 426. But see Long v. Beard, 3 Murph. 57. γ

But the king cannot grant toll to be taken in the highways, which are to be free to all people; and therefore a toll-traverse or toll-thorough cannot commence by grant at this day, but must be claimed by prescription.

Bro. Patent, 100; Noy, 176.

And indeed in all grants of this kind, the good of the public seems to

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be principally regarded, as appears by the writ of *ad quod damnum*; (a) and in this, that if the king creates or grants a fair or a market to a person, and afterwards grants another to another person to the prejudice of the first, the second grant is void.

Moor, 476, vide tit. *Fairs and Markets*, vol. iv. (a) F. N. B. 220. {A ferry is *publici juris*. It is a franchise which no one can erect without a license from the crown; and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a license, the crown has a remedy by a *quo warranto*, and the former grantee has a remedy by action. Willes, 512, *Blissett v. Hart*.}

All extra-parochial tithes belong to the king by his prerogative, and may be granted by him.

Bro. *Patent*, 33.

So, the king may grant a swan-mark or the game of wild swans in such a river, and such grant is good; but none can have a swan-mark unless he hath an estate of freehold of five marks *per ann.*

7 Co. 17, 18.

So, all royal mines belong to the king, and he may grant them, but it must be by express words.

Plow. 339.

None but the king can erect a *beacon* or sea-mark, unless he hath a license or a grant for that purpose.

Carter, 90.

Where the king hath a suit to a mill *ratione prærogativæ*, he may grant it.

Carter, 92.

All judicial offices which have been usually granted by the crown, are of the *insignia majestatis*, and so inseparably annexed to the crown, that they cannot be granted by any less authority, nor in any other manner, nor with other powers, than as warranted by the known and approved forms in such cases.

4 Inst. 87; Sid. 338; Co. Lit. 114; Lev. 219.

Hence commissions of a new invention, though under pretence of public good, have been condemned; as commissions to assay weights and measures.

4 Inst. 163, 245.

So, commissions to seize the goods and imprison the bodies of all persons who shall be notoriously suspected of felonies or trespasses, without any indictment or other legal process against them, have been held illegal and void.

2 Inst. 54.

So it has been held, that the king could not authorize persons to take care of rivers and the fishery therein, according to the method prescribed by the statute West. 2, (13 Ed. 1, stat. 1,) c. 47, before the making of that statute.

4 Inst. 161.

So a grant by Henry the Sixth to the corporation of dyers in London, of a power to search, &c., and if they found any cloth dyed with logwood, that it should be forfeit, was adjudged void; it being against law that any forfeiture (b) should incur by letters patent.

2 Inst. 4. (b) Sid. 441; Vent. 47.

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The crown may grant cognisance of pleas to proceed *secundum legem terræ*, but not to proceed by other laws; for that would be to make new laws, which the crown, being but one branch of the legislative power, cannot do.

Lit. R. 304; Hob. 48; 10 Mod. 125.

The king cannot grant to any to hold a court of equity, because this is in derogation of the common law; and the Chancery in Chester and Durham are incidents to a county palatine which had *jura regalia*.

Hob. 63; Noy, 147; 2 Roll. Abr. 192.

A grant to the town of Berwick that they should be a county, but no grant of having a sheriff, was adjudged to be void, because there would be no officer to execute and do justice.

Vent. 407.

There are likewise personal prerogatives which the king only can grant, and which are of so high a nature as that they cannot be delegated to any other; such as the power of making an alien a denizen, the power of pardoning felonies, &c.

Dyer, 300; Bro. Patent, 111; Skin. 606.

[A grant by the king within time of legal memory to a town of the right of sending representatives to parliament, is good without first incorporating such town. Thus, the city of Westminster, which hath never been incorporated, first sent members to parliament in the reign of Edward the Sixth.

Hargr. Co. Lit. 109 b, note 2.]

2. Of grants arising from his Interest.

It seems to be clearly agreed, that the king may alien, grant, or charge any branch of his revenue, in which he hath an estate of inheritance, as also his lands in fee-simple, though he is seised of them *jure coronæ*. (a) And this power is said to be founded on reasons of state, and arises from the nature of our constitution, by which the king is disabled to levy money on the subject without an act of parliament; so that if this power were not inherent in the crown, the kingdom might suffer by a sudden invasion, &c. Also, as rewards and punishments are the supporters of all governments, it is but highly reasonable that the crown should have the power of rewarding those who deserve well. And this hath been the constant usage of the kings of England, by granting out of the crown revenue pensions and estates to those whose services have been meritorious, as also to such of the nobility whose fortunes have come to decay.

Plow. 236, in *Ld. Berkley's case*; Vaugh. 62; Co. Lit. 19; 7 Co. 12. [(a) See *post*, 123. By 1 G. 4, c. 1, (the act settling the civil list for the life of G. 4,) § 12, it is provided, that nothing in the act contained shall impair the rights of control, management, or direction exercised by the crown, relating to leases, grants, or assurances of the small branches of hereditary revenue; but that such rights shall continue to be exercised, subject to the restrictions and regulations in force at the death of his late majesty; and as to the regulations on the granting of pensions and leases, &c., of crown lands. See *post*.]

“No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.”

Const. United States, art. 1, s. 9.

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Lands in ancient demesne, though they seemed most appropriate to the king's use of any of his revenues, (for the tenants had several privileges, all relating to the king, as not to be impleaded out of the manor, to be free of toil for all things concerning their sustenance and husbandry, not to be impelled on any inquest,) were, notwithstanding all this, always alienable.

5 Mod. 55, per Holt, C. J., vide tit. *Ancient Demesne*.

The goods of felons, fugitives, persons outlawed, &c., waifs, strays, deodands, wreck, &c., are deemed the flowers of the crown, and distinguished by that name: and these the king clearly may grant; and between these and liberties and franchises, which have no existence till created, a distinction hath been established, viz., That if the first of these, and the possessions to which they are appendent or annexed, come to the crown, they sink to the crown, and the king is seised of them again *jure coronæ*; but if the possessions to which liberties or franchises, such as fairs, markets, &c., are appendent, come to the crown, yet these last are not extinct, but continue to exist according to their first establishment.

9 Co. 25, The Abbot of Strata Marcella's case; Moor, 474; Palm. 78; And. 87; Mod. 232. See Reg. v. 40 Casks of Brandy, 3 Haggard, 257.

If the king grants to J S felons' goods, or waifs and strays within his manor, J S shall have them in the lands of the freeholders; for they are liberties due to the king, which he may grant, and are not charges to the subject; for the king hath this right in every man's land, and therefore may grant it to another.

Cro. Eliz. 463, Heigham v. Best.

The forfeiture of goods and chattels in an outlawry in a personal action belongs to the king, which the king may, and usually does grant to the person who is at the expense of suing out the outlawry; yet this is but *ex gratia regis*, and not *debito justitiæ*.

Yelv. 19; Will. R. 690.

All fines for offences *de jure* belong to the king, because it is his correction, and the public revenge is in his hands; but the king may grant them to others.

Ld. Raym. 213, 214.

It was agreed in the Banker's case, that King Charles the Second having the revenue of excise vested in him, his heirs and successors, by act of parliament, might grant or charge the same or any part thereof; and that, accordingly, the letters patent and grant of 25,000*l. per ann.* out of the hereditary revenue of excise, for the payment of interest to Sir Robert Vinor and others, of whom the king had borrowed large sums of money, till such time as the principal debt should be discharged, were good and valid in law, and bound the king's successors; although it was objected that this revenue was granted by act of parliament; that it arose out of the purses of the people, and that it was given in lieu of wards, liveries, purveyances, &c., which were inheritances unalienable. But to these it was answered and resolved, that being given in fee, though by act of parliament, it must have the same incidents as other inheritances in fee have, one of which is to be alienable at pleasure; and as to its being granted in lieu of inheritances which were unalienable, that was held not to be material, as those inheritances were extinct, and so could not affect inheritances of another nature newly given: besides, those inheritances of wards, liveries,

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&c., were in effect alienable, for they might have been released or discharged.

5 Mod. 46; Comb. 270; Skin. 601, pl. 11; The Banker's case; 11 St. Tr. 136.

[It should seem that before the Revolution there was properly no public revenue, but that all the revenues, both ordinary and extraordinary, were the king's only, and wholly disposable at his pleasure. Upon the introduction of the funding system at the Revolution, appropriations became necessary, and therefore a certain portion only of the revenues hath been since that period subject to the immediate disposition of the crown, for the support of its honour and dignity. This, in the late reigns, consisted of an annuity granted by parliament, and the hereditary revenues of the crown, that is the produce of certain branches of the excise, the post-office, the duty on wine licenses, the revenues of the remaining crown lands, the profits arising from courts of justice, and in King William's reign, the four and a half *per cent.* duties arising from Barbadoes and the Leeward Islands. But his present majesty having, soon after his accession, signified his consent that his own hereditary revenues might be so disposed of as might best conduce to the utility and satisfaction of the public; and having graciously accepted the limited sum of 800,000*l.* *per ann.* for the support of his civil list, the hereditary and other revenues were carried into and made a part of the aggregate fund; and the aggregate fund was charged with the payment of the whole annuity to the crown of 800,000*l.*, which, being found insufficient, was increased in 1777 to 900,000*l.* *per ann.*

||As to the civil list settled by 1 G. 4, c. 1, see *post*, 122.|| β Martin et al. v. Waddell, 16 Peters, 367; Arnold v. Mundy, 1 Halst. 1.*g*

The power of the crown with respect to grants out of the civil list was till lately wholly unlimited, that part of it called the pension list being totally discretionary in its amount. This occasioned great disorders in the administration of the civil list, and by exhausting too great a part of the revenues, disappointed the just claims of those who had liens upon them, and reduced the crown to the painful necessity of making application to parliament to supply the deficiencies. His present majesty having therefore been graciously pleased to express to his parliament his desire to discharge the debt on his civil list, without any new burden upon the public, and to introduce a better order and economy in the civil list establishment, it was proposed to reduce the pension list, both in its gross quantity, and in its larger individual proportions to a certainty. It is therefore enacted by stat. 22 G. 3, c. 82, § 17, that "for the better regulation of the granting of pensions," (that is, of pensions chargeable upon the civil list, for this act affects only to regulate and reform the civil list establishment,) "and the prevention of abuse or excess therein, no pension exceeding the sum of three hundred pounds a year shall be granted to or for the use of any one person; and that the whole amount of the pensions granted in any one year shall not exceed six hundred pounds; a list of which, together with the names of the persons to whom the same are granted, shall be laid before parliament in twenty days after the beginning of each session, until the whole pension list shall be reduced to ninety thousand pounds; which sum it shall not be lawful to exceed by more than five thousand pounds in the whole of all the grants: nor shall any pension to be granted after the said reduction to or for the use of any one person exceed the sum of one thousand two hundred pounds yearly, except to his majesty's royal family, or on an address of either house of parliament."

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And by § 18, reciting that "it had been usual that persons who have served the crown in foreign courts, had, after the expiration of their service, at his majesty's pleasure received such proportion of their former appointments, as to his majesty hath seemed expedient, it is enacted, That nothing in this act (a) contained relative to pensions shall be construed to extend to such allowance, either in present or in future, provided that the said persons do not severally enjoy some place or other profit from the crown to the amount of the pension usually allowed in such cases; provided that the list of the said pensions shall be laid in the manner before mentioned before parliament."

|| (a) By 50 G. 3, c. 217, § 13, no pension shall be granted to any person for having served in foreign courts within less than ten years from the date of his appointment, during which time he shall have served not less than three years, and no such allowance shall exceed 2000*l.* *per annum*, and shall abate if he be appointed to any civil office of equal amount, and shall be subject to proportionate abatement if its value is less than the amount of such allowance; and by § 14, the grantee of any such pension shall be not less than thirty-five years old, and the secretary for foreign affairs must certify that he has not within ten years declined serving as a foreign minister unless for sufficient cause. But by 51 G. 3, c. 21, the above provisions do not apply to persons who, previous to the passing of that act, had served in foreign courts, nor to the 22 G. 3, c. 82, so far as respects the grant of allowances to persons who, previous to that act, had so served the crown.||

By § 19, reciting that "much confusion and expense had arisen from having pensions paid at various places, and by various persons; and that a custom had prevailed of granting pensions on a private list during his majesty's pleasure, upon a supposition that in some cases it may not be expedient for the public good to divulge the names of the persons in the said list, or that it may be disagreeable to the persons receiving such payments to have it known that their distresses are so relieved, or for saving the expense of fees and taxes on small pensions; by means of which usage secret and dangerous corruption may hereafter be practised:" Reciting further, that "it is no disparagement for any persons to be relieved by the royal bounty in their distress, or for their desert, but on the contrary it is thought honourable on just cause to be thought worthy of reward, it is enacted, That no pension whatever on the civil establishment shall thereafter be paid but at the Exchequer, and in the same manner as those pensions which were then paid and entered at the exchequer, under the head, title, and description of *Pensions*, and with the name of the person to whom, or in trust for whom the said pension is granted; and that those which are transferred thither by this act shall be subject to no taxes or fees whatever, except the taxes and fees to which before this act they were subject; any statute, law, or usage to the contrary notwithstanding: Nor shall any pension hereafter to be granted be charged at the exchequer with further or other fees than were heretofore paid on pensions to the paymaster of the pensions." It is, however, by § 21, permitted to the high treasurer, or first commissioner of the treasury for the time being, to return into the exchequer any pension or annuity without the name of the person to whom it is made payable, on his taking an oath, that according to the best of his knowledge, belief, and information, the pension or annuity so returned without a name by him into the exchequer is not directly or indirectly for the benefit, use, or behoof of any member of the House of Commons, or so far as he is concerned, applicable, directly or indirectly, to the purpose of supporting or procuring an interest in any place returning members to parliament: upon taking which oath it is enacted by

(F) Of the King's Grants and Letters Patent. (*Pensions.*)

§ 22, that the pension or annuity shall be paid at the exchequer to the order of the high treasurer or first commissioner, whose receipt shall be accepted and taken as an acquittance for the same. But by § 23, if any such secret pension shall continue in the list for more than five years, the high treasurer or first commissioner of the treasury, or one of the secretaries, or one of the chief clerks of the treasury for the time being, shall make oath, before such pension shall be paid at the exchequer, that he believes that the person for whose use the said pension or annuity hath been granted is living.

By stat. 25 G. 3, c. 61, certain small bounties of the crown therein mentioned, payable to persons in low and indigent circumstances, are exempt from the operation of this clause, and the same are allowed to be paid as they formerly had been.

In order to prevent, as much as may be, all abuses in the disposal of moneys issued under the head of secret service money, or money for special service, the sum to be issued or paid from the civil list revenues for the purpose of secret service within this kingdom shall not exceed the sum of ten thousand pounds in any one year: and as to foreign secret service money, it is enacted, that when it shall be deemed expedient by the Treasury to issue, or in any manner to direct the payment of any money from the civil list revenues for that purpose, the same shall be issued and paid to one of his majesty's principal secretaries of state, or to the first commissioner of the admiralty, who shall for his discharge at the exchequer, within three years from the issuing of such money, produce the receipt of his majesty's minister, commissioner, or consul in foreign parts, or of any commander-in-chief, or other commander of his majesty's navy or land forces, to whom the said money shall have been sent or given, that the same hath been received for the purpose for which the same hath been issued; which receipt shall be filed in the Exchequer to charge the said minister, commissioner, &c., with the same; and the said receipt, on proof of the handwriting, shall be sufficient to acquit and discharge the said secretary, &c., in their accounts at the Exchequer. And by § 26, any foreign minister, &c., charged at the Exchequer with the receipt of any secret service money, shall stand acquitted thereof, if within one year after his arrival in Great Britain, he shall either return the said money into the Exchequer, or make oath before the barons of the Exchequer, or one of them, that he has disbursed the money intrusted to him for foreign secret service, faithfully, according to the intent and purpose for which it was given, according to his best judgment for his majesty's service. And by § 27, whenever it shall be necessary for the secretary or secretaries of state, or first commissioner of the admiralty, to pay any money issued for foreign secret service, or for secret service in detecting, preventing, or defeating treasonable or other dangerous conspiracies against the state in any place within this kingdom, then it shall be sufficient to acquit and discharge such secretary, &c., or such secretary or secretaries, or the under-secretary of state in the office to which such secret service money hath been paid, or for the first commissioner of the admiralty, or the secretary of the admiralty, to make oath, that the money paid to him for foreign secret service, or for secret service in detecting, preventing, or defeating treasonable or other dangerous conspiracies against the state, (*mutatis mutandis, as the case may be,*) has been *bonâ fide* applied to the said purpose or purposes, and to no other; and that it hath not appeared to him convenient that the same should be paid abroad. By § 28, it is enacted, that

(F) Of the King's Grants and Letters Patent. (*Pensions.*)

no certain or stated sum shall be given or allowed out of the civil list revenues, under the name of secret service money, as had been theretofore the practice; but when any moneys for secret service shall be deemed necessary by the commissioners of the treasury, the same shall be issued by their direction, as the occasion shall require, in the manner thereinbefore directed. And by § 29, whenever any money shall be issued for the purpose of any special service, or shall be given without provision of annual or other stated payment, but in a gross sum or sums, as to any secretary or secretaries of the treasury, or others, to be paid over to or for the use of any person or persons for special service, or as of royal bounty, the said money, together with the special service or services, or as of royal bounty, to which the same is applied, as also the name of the person or persons to whom it is paid, shall be entered in a book to be kept for that purpose in the treasury, in order to be produced to either house of parliament, if required. And for the better prevention of all practice by which such grants as of bounty may be made a colour under which pensions may be substantially granted, it is enacted by § 30, that any money so given as of royal bounty, to any person more than once in three years, the same is and shall be reputed a pension to all intents and purposes whatsoever.

||By 57 Geo. 3, c. 65, it is enacted, that after two years from the passing of the act, his majesty may, under the sign manual, countersigned by three lords commissioners of the treasury, grant unto any person who shall have served his majesty not less than two years, as first lord of the treasury, or admiralty, or as secretary of state, or chancellor of the Exchequer, a pension for life, not exceeding 3000*l.*, and at the expiration of any further period of two years from the passing of the act, may grant other like pensions to any other such persons, until, at the expiration of twelve years from the passing of the act, six pensions shall have been granted, and after such six pensions of 3000*l.* shall have been granted, his majesty shall not grant any further pensions in respect of such offices: provided that when any such pension shall cease by death, &c., his majesty may grant other like pensions to any other such persons under the like restrictions, so that no greater number of pensions than are allowed by this act shall be in force at any one time, and so that after the expiration of twelve years no greater number than six such pensions shall be granted or existing at any one and the same time, except as in the act excepted.

By § 2, his majesty is empowered to grant, after two years from the passing of the act, one other like pension of 3000*l.* to any such person as aforesaid, although such person shall not have held the office two years, and although the full number of pensions under the provisions of the act shall be in force: provided that every such pension shall be considered supernumerary, and shall, upon the ceasing of the first of any such pensions as shall be then in force under the provisions of the act, be deemed one of the pensions allowed by the act.

Section 3 empowers his majesty to grant pensions of 2000*l.* to persons having filled the offices of secretary for Ireland, or secretary at war, under the same restrictions and provisions as those in § 1, except that the period of service is five years, the pensions are not grantable till four years after the passing of the act, and the number of pensions allowed to be in force at once is only three.

By § 4, his majesty is empowered in a similar manner to grant pensions of 1500*l.* to persons holding the offices of joint secretary of the treasury,

(F) Of the King's Grants and Letters Patent. (*Pensions.*)

or first secretary of the admiralty, the period of service being five years, the pensions not being grantable till two years after the passing of the act, and not more than six of such pensions to be in force at once.

Section 5 relates to pensions to the chancellor of exchequer for Ireland.

By § 6, his majesty is empowered to grant pensions of 1000*l.* to any persons having filled the office of under secretary of state, or clerk of ordinance, or second secretary to the admiralty, under the regulations in § 1, the period of service being ten years, the pensions not to be grantable till the expiration of two years from the passing of the act, and not more than six such pensions to exist at once.

By § 7, in case any person shall have served in more than one of the classes of offices specified in the act, in respect whereof his majesty may grant a pension less than 3000*l.*, his majesty is empowered to grant to such person a pension not exceeding the pension annexed to the highest class of office in which such person has served, wherever his whole service in the several offices amounts to eight years, provided such person shall have served in such highest class for three years.

By § 8, every grant of a pension under this act to any person actually holding his office shall not take effect during his continuance in such office; and every such grant shall contain a provision for the suspension of such pension during the period of the person holding any office, place, or employment under his majesty, the profits of which shall be not less than double the amount of such pension; and shall also contain a provision for the abatement of one half of the pension during the time the pensioner shall hold any place under his majesty of equal amount with the pension, and no grant shall be valid without such provisions.||

The act ||22 G. 3, c. 82,|| next divides the payments of the civil list revenues into several distinct classes, and directs that no salary or pension shall be paid but in the order there prescribed. And it further provides, that if any salary, fee, or pension, or any part thereof, remain in arrear at the usual time of payment, at the end of a period of two years, from want of cash belonging to the civil list revenues to pay and discharge the same, such arrear shall not be carried as a debt to the account of the year following, but shall be wholly lapsed and extinguished, as if the same had not been payable.

||By the 56 Geo. 3, c. 46, intituled *An Act for appropriating the civil list revenues, to insure regular payment of the annual charges thereon, as specified in a schedule of the several classes thereof annexed*, the amount of the several classes are stated in a schedule, (since amended by the 1 Geo. 4, c. 1,) and the treasury are to direct every quarter what sums shall be appropriated out of the civil list revenues to each distinct class, and the sums so appropriated are to be accordingly applied.

By the 1 Geo. 4, c. 1, all the powers and provisions of the 1 Geo. 3, c. 1, 22 Geo. 3, c. 82, 25 Geo. 3, c. 61, 27 Geo. 3, c. 13, 33 Geo. 3, c. 34, (*tr.*) 54 Geo. 3, c. 157, 56 Geo. 3, c. 46, 59 Geo. 3, c. 22, or of any other statute of Great Britain or Ireland, or of the United Kingdom in force at the demise of George the Third, are kept in force and applied to the civil list revenues, granted by that statute to his majesty George the Fourth. And by § 7, wherever the total charge on the civil list exceeds 1,070,000*l.*, an account of the excess is to be submitted to parlia-

(F) Of the King's Grants and Letters Patent. (*Crown Lands.*)

ment. The civil list settled by this act is 850,000*l.* in England, and 207,000*l.* in Ireland.||

The statute of 1 Ann. c. 7, which provides for the civil list establishment of that reign, restrains the power of the crown in the disposal of its land revenue, and enacts that no grant shall be made by the crown of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments, (advowsons of churches and vicarages only excepted,) whether belonging to the crown in right of the crown of England, or as part of the principality of Wales, or of the duchy or county palatine of Lancaster, or otherwise howsoever, for any longer term than one-and-thirty years or three lives, or some term determinable upon one, two, or three lives, and unless it be made to commence from the date or making thereof; and if to take effect in reversion, it do not, together with estate in possession, exceed three lives or the term of one-and-thirty years in the whole; unless the tenant be punishable for waste, and unless the ancient rent, or more, that hath been paid for the greater part of twenty years prior to the grant, be reserved upon it; and if no rent hath been paid before the grant, then unless there be reserved a reasonable rent, not under the third part of the clear yearly value of the estates comprised in the grant; and also such rents be made payable to the queen, her heirs or successors, who shall make such grant, and to her or their heirs or successors, during the whole term of the continuance thereof. But where the greatest part of the yearly value of any tenements or hereditaments belonging to the crown shall, at the time of making any lease or grant thereof, consist of buildings thereon, which may want to be repaired or re-edified, in such case, to encourage the rebuilding or reparation thereof, it is provided that the crown may grant such tenements or hereditaments, for a term not exceeding fifty years or three lives, so as such grant be made to commence from the date or making thereof, or if in reversion, that it do not, with the estate in possession, exceed fifty years or three lives from the date or making thereof, and that it be under the other restrictions required in the grants of one-and-thirty years. But this proviso is repealed by stat. 34 Geo. 3, c. 75, except as to grants under the seals of the duchy and county palatine of Lancaster; and it is enacted, that where any land or ground belonging to the crown shall be deemed proper by the treasury for the erection of houses or other buildings thereon, or for necessary gardens, yards, curtilages, and other appurtenances to be enjoyed therewith,^(a) and shall be by their order directed to be appropriated to that use, and where the lessee shall agree and covenant to erect buildings thereon of greater yearly value than the land or ground so to be leased or granted, or where the greatest part of the yearly value of any tenements or hereditaments belonging to the crown doth or shall, at the time of making any grant thereof, consist of any buildings thereon, in any of those cases, the crown may grant the land or ground so directed to be set apart, or the tenements or hereditaments of the above description, for any term not exceeding ninety-nine years, or three lives, to be computed from the date of the grant, or if in reversion, not exceeding, together with the estate in possession, the like term of ninety-nine years, or three lives, to be computed in like manner from the date of the grant, so as when there shall happen to be any substantial building upon the ground to be demised, or that the buildings thereupon shall not require, or not be intended and agreed to be rebuilt, there be reserved an annual rent not less than two-thirds of such annual sum as shall

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be deemed by the treasury a reasonable rent or consideration for such buildings and ground respectively, for the term intended to be granted, and so as there be paid to the use of the crown a fine to the amount of the remaining part of such annual sum, subject to a discount, which shall not be computed at a higher rate than the highest legal rate of interest at the time of making such grant; and when there shall happen to be no substantial building on such ground as the buildings thereon require, or shall be intended and agreed to be rebuilt, or other new buildings to be erected thereon, in that case there shall be reserved such annual rent as shall be deemed by the treasury a reasonable rent or consideration for such land and old buildings for the term intended to be granted, without taking any fine for the same; so as in every lease of land and buildings of this last description there be contained a covenant or condition on the part of the grantee, for the erecting of proper and substantial houses and buildings thereon, within a reasonable time, to be in each case limited for that purpose, and such other covenants for keeping buildings in repair, and doing all such other acts as the treasury shall think reasonable; and so as all such rents be reserved to be paid free of all taxes and assessments during the whole term, except such rent or such part thereof, during such part of the term as the treasury shall think fit to be allowed, not exceeding in any case the term of three years: and so as every such grantee or lessee sign, seal, and deliver a counterpart of his grant or lease, which counterpart shall not be subject to any stamp duty.

[(a) By 48 G. 3, c. 73, § 1, where ground of his majesty shall be deemed by the lords of the treasury, or the chancellor of the duchy of Lancaster for the time being, fit for gardens or curtilages, &c., to be used with houses built on ground of his majesty, or any other proprietor, it shall be lawful for his majesty to demise such ground for any term not exceeding 99 years; provided (§ 2) that no land, for garden, curtilage, &c., to be enjoyed with any houses, &c., under lease from his majesty, shall be granted for any term exceeding the term for which the houses, &c., are holden; and by § 3, no lease of any ground or land belonging to his majesty within the ordering or survey of the exchequer in England shall be granted for any life or lives; and by § 4, it shall be lawful to renew any such land demised for garden, curtilage, &c., upon such terms as are prescribed by the 34 G. 3, c. 75, for the renewal of leases thereby authorized to be granted not exceeding 99 years.]

And it is further enacted, 34 G. 3, c. 75, § 4, that on every grant, lease, or other assurance by the crown under the great seal, or seal of the exchequer of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments, (advowsons of churches and vicarages, and such tenements and grounds, with buildings erected thereon, as are hereby authorized to be granted for any term not exceeding ninety-nine years or three lives, and whereon any fine or fines shall be payable as aforesaid, only excepted,) whereby any estate or interest whatever at law or in equity shall pass from the crown, there be reserved such clear annual rent as by the treasury shall be deemed reasonable, without taking any fine for the same; which rent shall be made payable to the crown during the whole term of the continuance thereof; but no such grant shall be good unless the grantee execute a counterpart thereof, such counterpart however not to be subject to any stamp duty.

§ 5. With respect to the renewal of the crown leases, (a) it is enacted, that no lease or grant of any manors, messuages, lands, tenements, tithes, woods, or other hereditaments belonging to the crown, within the ordering and survey of the exchequer in England, shall be renewed, until within five years of the period of the expiration thereof, except such tenements

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and hereditaments as are authorized by this act to be granted for any term not exceeding ninety-nine years: nor shall any grant of any such tenements and hereditaments so authorized to be granted, be renewed until within twenty years of the period of the expiration thereof, nor any grant for lives, so long as there shall be more than one of such lives in being. However, where it shall appear to the satisfaction of the treasury, that any person has, at any time before the passing of this act, entered into any covenants or engagements to obtain renewals at earlier periods, in confidence that the same could be renewed according to the ordinary practice in such cases, in that case a renewal may be made at a greater distance of time from the expiration of the lease, so as to enable such person to perform his engagements: In like manner, where any person shall be the lessee of any tithes of any lands, or any profits issuing out of any lands, and shall be the owner of, or interested in such lands, the treasury may order a renewal of such lease at such times as shall appear to them convenient for the most beneficial enjoyment of such tithes or other profits together with such lands; and where it shall appear to the satisfaction of the treasury, that any lessee of lands belonging to the crown has, before the passing of this act, demised, or agreed to demise the same, for the purpose of improving them by building, and has entered into any covenants or engagements, in consequence whereof such person would, by reason of the improvements so made, be bound to pay, upon the renewal of any lease or grant of such lands, more than he would be entitled to receive from the under lessees or lessee thereof; in such case, the treasury may make an abatement in the rent and fine to be reserved and paid to the crown in consequence of such improvements, and such lease or grant as shall be made (regard being had to such circumstances) shall be good and effectual.

§ 7. It is also provided, that where any wastes belonging to the crown shall be enclosed by the authority of parliament, or where any lands or grounds belonging to and held under any lease or grant from the crown under the great seal, or seal of the exchequer, shall be deemed by the treasury fit to be planted and appropriated to the growth of wood or timber, or any farm-house, or other substantial building, to be erected for the better management and improvement of any lands or grounds, or any pits, shafts, levels, watercourses, engines, or other works to be made for the better working of any mines, quarries, or collieries belonging to the crown, and holden as aforesaid, and where the term or estate in possession therein shall be deemed by the treasury to be insufficient to repay the cost and charges of such works and improvements, with reasonable profit and advantage to the parties making or causing the same to be made, or to their representatives or assigns, in all such cases it shall be lawful at any time hereafter to grant any further lease of any such houses or other buildings, land, or ground, for any term not exceeding the term hereby authorized to be granted; provided that there be reserved and made payable to the crown the rents above required, and that covenants or conditions be inserted therein on the part of the lessees, for erecting such new houses or other buildings, and performing such respective works and improvements, at the costs and charges of such lessees, within a reasonable time, to be in each case limited and appointed for that purpose, where such houses or buildings, or works and improvements, shall not have been previously erected or made.

§ 8. But no grant shall be made of any lands capable of survey until a survey shall be had, and estimate be made, of the improved annual value

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of the estate proposed to be granted, by a surveyor to be appointed by the treasury or surveyor-general of the land revenue,^(b) which surveyor is to certify the same upon oath, and is also to state for what term of years it shall appear to him most beneficial for the interest of the crown to grant such holding or ground, regard being had to the quality and condition of the building, then standing upon such ground, and of the buildings proposed to be erected thereon. § 9. But where the tenements proposed to be leased are of a fixed and unimprovable value, or where they are incapable of valuation by means of a survey or inspection, or where they are of such small value as not to be worth the expense of a survey, a lease of them may be granted or renewed, under the direction of the treasury, without any previous survey or estimate.

¶(a) See 48 G. 3, c. 73, § 7.¶ ¶(b) The functions of the surveyors-general are now vested in the commissioners of his majesty's woods, forests, and land revenue. 50 G. 3, c. 65.¶

§ 21. The act further provides, that the surveyor-general shall every three years, within thirty days after the commencement of the session of parliament, certify under his hand and seal to the king and both houses of parliament, what leases or grants of any part of the land-revenue of the crown shall have been made within that time, for what terms, and also the annual value of the tenements and hereditaments comprised in such leases, as returned on oath by the surveyors employed to survey the same, and the annual value by the last preceding survey thereof, (where there shall happen to be a former survey or valuation thereof in the custody or power of the surveyor-general,) what rents shall have been reserved upon, and what fines paid for every such lease, and the considerations for making them; and also, so far as the same can be done, the rents and fines which were reserved and paid upon or for the last preceding lease or grant of such tenements or hereditaments.

¶By 48 Geo. 3, c. 73, the surveyor-general may, with approbation of the treasury, contract for the surrender of any crown lease, or purchase and buy up any lease, or term of any messuages, &c., held of the crown, which may be convenient for the public service, and pay the consideration out of the moneys arising from any sales theretofore made, and which may be vested in the bank of England, or which may thereafter arise from the sale of any property belonging to the crown under that act, or the recited acts.

By § 10, the chancellor and council of the duchy of Lancaster may sell and dispose, under the duchy seal, of crown manors in the duchy, consisting of manerial rights without lands, or with very small quantities of land, and manors in the duchy of which his majesty is not sole proprietor, and intermixed with the property of individuals, and lying remote from other crown property, and of ground or buildings appertaining to any castle or strong building now or lately used for a common jail, or with any building used for holding the assizes, or for the court-house or jailer's house, or in which the magistrates for any district may claim to have rights, and of tithes, in the duchy issuing out of the property of individuals, and of mills, fisheries, ferries, tolls, and stalls of markets, fairs, and wastes of the crown, upon which encroachments have been made by individuals, for the best prices which they can procure for the same: and by § 11, similar property, elsewhere situate, may be sold by the surveyor-general.

By § 13, the surveyor-general may agree with any persons, tenants of

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copyhold tenements held of the crown for the enfranchisement of such tenements, or with any persons (though not tenants of such copyholds) for the sale of the manerial rights of the crown therein, for the best price which can be procured, and which shall be approved by the treasury; and the tenements so agreed to be enfranchised, &c., and the consideration, shall be specified in a certificate to be granted for that purpose, &c., to be enrolled and attested in the form and manner, &c., contained in the 34 Geo. 3, c. 75, § 11, as to the conveyance of fee-farm rents; and such certificate and receipt for the consideration money shall be enrolled in the court rolls of the manor, by the steward, or his lawful deputy, and after such enrolments and thenceforth the copyhold tenements included in such certificate shall be enfranchised, and the tenants freed and discharged from all claims and demands which may be made by his majesty, &c., or any persons claiming under him as lords of the manor, to which such tenements belonged, &c.: provided, (§ 14,) that no such contract shall be made unless by special warrant issued for that purpose by the lords of the treasury.

By § 28, 29, 30, provisions are made for exchanging lands of the crown for lands of individuals, as to which see also 52 G. 3, c. 161, § 2, 4, and 1 & 2 G. 4, c. 52, § 4. ||

Although the above statute of 1 Ann. c. 7, § 7, restrains the crown from alienating the hereditary revenues and duties thereby granted for the support of the civil list, yet it does not disable it from making such grants or leases of lands and hereditaments, parcel of the duchy of Cornwall, as it was authorized to make by stat. 12 W. 3, c. 1, or from granting away or restoring estates forfeited for treason or felony, seized upon outlawry, or taken in execution, or from making customary grants or admittances of copyhold estates. And the statute of 1 G. 3, c. 1, which carries the hereditary duties to the aggregate fund, confirms and establishes the above clauses of the statute of Queen Anne.

|| And see 1 G. 4, c. 1. ||

|| By the 39 and 40 Geo. 3, c. 88, § 1, reciting the above statutes of Ann. and Geo. 3, restraining and regulating grants, leases, &c., of crown lands by the kings and queens of England, it is enacted, that none of the provisions and restrictions of the said acts shall extend to any manors, messuages, lands, tenements, or hereditaments, which have been or shall be purchased by his majesty, his heirs, or successors, out of any moneys issued for the use of the privy purse, or with any moneys not appropriated to any public service, or to any manors, &c., which have or shall come to his majesty, his heirs or successors, by gift, devise, or descent from any ancestors, not being kings or queens of this realm.

And by § 4, his majesty, his heirs and successors, are empowered by instrument under the sign-manual, attested by two or more witnesses, or by will attested by three or more witnesses, to grant, sell, give, or devise, any such manors, &c., as any of his majesty's subjects might grant, sell, give, or devise the same.

And by § 5, if no disposition by grant, will, or otherwise, shall be made in pursuance of this act of such manors, &c., then such manors, &c., shall, on the demise of his majesty, &c., descend and go in the same manner as if this act had not been made, subject to the provisions of § 10 as to so much thereof as shall be personal estate; and all such manors, &c., being of freehold tenure in fee-simple, which shall so descend on the demise of

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any king or queen, shall be subject to all the restrictions in the said recited acts as to crown lands.

By § 6. All such manors, &c., vested in his majesty, &c., or any trustees for him, shall be subject to all such taxes and impositions, parliamentary and parochial, as the same would have been subjected to in the lands of any subject; such taxes, &c., to be discharged out of his majesty's privy purse.

By § 9, any queen consort is empowered, during the joint lives of the king and such queen consort, by deed or will to grant, alien, or devise any manors, &c., purchased by, or in trust for her; and also by will to bequeath all chattels, real or personal, in all respects as if she were sole or unmarried.

By § 10, it is enacted and declared, that all such personal estate of his majesty, &c., as shall consist of moneys issued for the use of the privy purse, or not appropriated to any public service, or goods, chattels and effects not come to his majesty, &c., with or in right of the crown of this realm, shall be deemed personal estate subject to disposition by will; and such will shall be in writing, under the sign-manual, or shall not be valid; and all such personal estate shall be subject to such debts as are payable out of the privy purse and subject thereto; such personal estate not bequeathed or disposed of shall go in such manner on the demise of his majesty, &c., as if this act had not been made.

By the 4 Geo. 4, c. 18, the powers of the last act are extended and applied to all manors, &c., whereof his majesty, his heirs or successors, or any trustees for him or them, at the time of his or their *accession to the crown*, were or should be seised or possessed, and which before such accession he or they might have legally granted, sold, given, or delivered. ||

The duty of four and a half *per centum* arising from Barbadoes and the Leeward Islands, was a perpetual and irrevocable revenue granted to King Charles II., his heirs and successors, originally by an act of the assembly of Barbadoes, and afterwards by similar acts of the assemblies of the other British Leeward Islands, charged upon all dead commodities the growth of the islands shipped to any part of the world. It appears to have been granted in exchange for an acknowledgment of forty pounds of cotton *per* head, and all other duties, rents, and arrears of rent due to the proprietor or grantee of the above islands, for quieting the possessions of the inhabitants of the islands, for a full confirmation of their estates and tenures, for holding their several plantations to them and their heirs for ever in free and common socage, and in consideration of the great charges necessary for maintaining the honour and dignity of his majesty's authority there, the public meetings of the sessions, the often attendance of the council, and the reparations of the forts and other public charges incumbent upon the government. These duties were, during part of King William's reign, appropriated with the other hereditary revenues of the crown for the support of the civil list, but were disappropriated in the commencement of the succeeding reign. This disappropriation seems to have taken place in consequence of an address from the House of Commons* to the queen, grounded upon a petition to that House from the merchants and planters of Barbadoes, praying that the duties may be applied to the local purposes of the islands, with which, as it may be supposed, the queen promised a compliance. But notwithstanding this resolution and address of the House of Commons, and consequent declaration from the throne, these duties

(F) Of the King's Grants and Letters Patent. (*4½ per Cent. Duties.*)

have not in fact been, or been considered to be, appropriated merely to the service of the islands, but are holden to be an entirely open fund, applicable to any purposes, which the bounty of the crown may direct, or its necessities may require.

The act in Barbadoes was passed the 12th of Sept. 1663. Vide stat. 1 Ann. c. 7; Comm. Journ. 30 March, 1702 See debates in the House of Lords, in March, 1795, upon the pensions granted out of this fund to Lord Auckland and Mr. Burke. The right of the crown to levy the seduties, by virtue of the prerogative, only in the newly ceded islands upon the peace of 1763, was very fully discussed in the case of Campbell and Hall. Cowp. 204. That case was as follows:—The island of Grenada surrendered by capitulation in 1762, and, with its dependencies, was finally ceded to Great Britain by the definitive treaty of peace at Paris, on the 10th of February, 1763. The chief stipulation material to the present purpose in favour of the inhabitants, as well by the treaty as by the articles of capitulation, was this:—That, as they would become, by their surrender, subjects of Great Britain, they should enjoy their properties and privileges, and pay taxes, in like manner as the rest of his majesty's subjects of the other British Leeward Islands. The island and its dependencies being thus become a British colony, one of the first measures of government was to issue a proclamation under the great seal, bearing date the 7th day of October, 1763, wherein, amongst other things, it is declared, "That the king, by letters patent under the great seal, had given express power and direction to the governor, as soon as the state and circumstances of the colony would admit thereof, with the advice and consent of the council, and the representatives of the people, to make, constitute, and ordain laws, statutes, and ordinances, for the good government thereof, as near as may be agreeably to the laws of England, and under such regulations and restrictions as are used in the other British colonies." This proclamation was followed by another, dated the 26th of March, 1764, inviting purchasers upon certain terms and conditions. The governor thus said to have been appointed, was General Melville, whose commission however did not bear date until the 9th of April, 1764, and the assembly which he was directed to summon met for the first time in 1765. But before that time, indeed before the departure of the governor from England, letters patent were issued under the great seal, bearing date the 20th of July, 1764, which, after reciting, that the above duty of four and a half *per centum* was payable in Barbadoes, and in all the British Leeward Islands, and the expediency and importance to the other islands that the like duty should take place in Grenada, orders and directs, by virtue of the prerogative royal, that from and after the 29th day of September then next, the duty of four and a half *per centum* in specie should be raised and paid to the king, his heirs and successors, upon all dead commodities, the growth and produce of Grenada, that should be shipped off from the same, in lieu of all customs and duties formerly paid to the French king. The question therefore submitted to the court was, Whether it was competent to the crown, under the above circumstances, to levy this duty merely by virtue of the prerogative royal? The determination of the court was against the crown, but it rested solely on the circumstance of the proclamations of October, 1763, and March, 1764, being of prior date to the letters patent, by which means the king had precluded himself from the exercise of legislative authority over Grenada, before the letters patent were issued. "Through inattention," said Lord Mansfield, "of the king's servants, in inverting the order in which the instruments should have passed, and been notoriously published, the last act is contradictory to, and a violation of the first, and is therefore void; and the duty can only now be levied, by an act of the assembly of the island, or by an act of the parliament of Great Britain." But, although the question in this case was immediately determined upon the inversion of the order of the instruments, yet the noble and learned judge, in delivering the judgment of the court, went very fully into the law upon the subject. His lordship stated these six propositions as clear, and in which the counsel on both sides were perfectly agreed. 1st, A country conquered by the British arms becomes a dominion of the king in right of his crown; and therefore necessarily subject to the legislature, the parliament of Great Britain. 2d, The conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens. 3d, The articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable, according to their true intent and meaning. 4th, The law and legislative government of every dominion equally affect all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland,

(F) Of the King's Grants and Letters Patent. (*Grants.*)

Minorea, the Isle of Man, or the Plantations, has no privilege distinct from the natives. 5th. The laws of a conquered country continue in force until they are altered by the conqueror: the absurd exception as to Pagans, mentioned in Calvin's case, shows the universality and antiquity of the maxim. For that distinction could not exist before the Christian era, and in all probability arose from the mad enthusiasm of the Crusades. 6th. If the king, that is, the king without the concurrence of parliament, has a power to alter the old and introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion: as, for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put. As to the question, Whether the king had of *himself* the power to substitute the present duties instead of the imposts formerly paid to the French king, between the 10th February, 1763, the day the treaty of peace was signed, and the 7th of October, 1763, the day on which the first proclamation bears date, his lordship said, "It is left by the constitution to the king's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword, or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection, and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted, that the king may change part or the whole of the law or political form of government of a conquered dominion." His lordship then went into the history of the conquests made by the crown of England, and in the course of his inquiry took notice of the opinion delivered by Sir Philip Yorke and Sir Clement Wearge respecting Jamaica. In 1722, the assembly of that island being refractory, it was referred to those two great law officers to know, "what could be done if the assembly should obstinately continue to withhold all the usual supplies." They reported thus: "If Jamaica was still to be considered as a *conquered island*, the king had a right to *levy taxes* upon the inhabitants; but, if it was to be considered in the *same right* as the other colonies, no tax could be imposed on the inhabitants, but by an *assembly of the island*, or by an *act of parliament*."

The forfeited estates in Scotland, which are annexed to the crown by the statute of 25 Geo. 2, c. 41, are disannexed therefrom by the statute of 24 Geo. 3, sess. 2, c. 57, for the purpose of enabling his majesty to grant them to the heirs of the former proprietors.]

3. How far the King must have an Interest, in order to enable him to grant.

There are three kinds of inheritances which the king may grant, though different as to the manner; which difference arises from the nature of his interest. 1st, All his lands, tenements, rents, commons, &c., he may grant in possession, reversion, or remainder. (a) 2dly, A corody in a religious house, or presentation to a church, which he can only grant in possession, or when the corody or the church become vacant; for of these he hath only the presentation or recommendation, and therefore cannot grant them in reversion. 3dly, Offices which he may grant, but cannot himself occupy.

8 Co. 55 b, 56 a. (a) Grants of the crown lands are now restrained by stat. 1 Ann. c. 7, *suprà*; || and vide 39 & 40 G. 3, c. 88; 4 G. 4, c. 18, *suprà*.||

If the king grants for three lives, *habendum a die confectionis litterarum patentium*, this is void; because an estate of freehold cannot commence *in futuro*, and letters patent under the great seal amount to a livery; and if the freehold should pass immediately from a day to come, then the king would have a particular interest in the mean time without any donor, which is against the rules of law.

5 Co. 93, Berwick's case; Moor, 393, S. C.

Upon a grant of the office of a searcher in the port of Plymouth, it was

(F) Of the King's Grants and Letters Patent. (*Patents.*)

adjudged, that the king may grant an estate in an office to commence *in futuro*, or upon a contingency; for he hath no inheritance in the office or the execution of it, but in point of interest only to grant; and it was said in this case, that there was a diversity between offices in fee existing, and such as were granted only for life; which being as a new thing created might, as a rent *de novo*, be granted to commence *in futuro*.

4 Mod. 275; The King v. Kemp, 2 Salk. 465, pl. 2; Carth. 350; Comb. 334 S. C.; Ld. Raym. 49; Skin. 46, pl. 4.

The king may grant that which is not actually in him at the time of the grant; as the marriage of a ward, (a) *quandio acciderit*; although he had the ward in right of his prerogative.

Dyer, 108; 2 Roll. Abr. 198; Jenk. 246. (a) Wards, liveries, purveyances, &c., were always in effect alienable, as they might be released or discharged. 5 Mod. 56; Skin. 605; per Holt, C. J., in his argument in the Banker's case.—But the king cannot grant land when it shall escheat. Raym. 241.—Whether he can grant land when it shall become derelict. Raym. 241; 2 Lev. 171. β A legislative grant is irrevocable. Terrett v. Taylor, 9 Cranch, 43; and its validity does not depend on its containing the technical terms usual in a conveyance. Rutherford v. Green's heirs, 2 Wheat. 196. A grant of land in possession of the Indians, by the governor of Spain, passed the right of the crown, and severed them from the royal domain, so that they became private property. United States v. Fernandez, 10 Peters, 303. If the state had no title, or the officer no authority to issue the grant, it is void. Polk's lessee v. Wendall, 5 Wheat. 293. No grant of land by the government can affect a pre-existing title. City of New Orleans v. De Armas, 9 Peters, 224. See also Johnson v. M'Intosh, 8 Wheat. 543; Martin et al. v. Waddell, 16 Peters, 367; Arnold v. Munday, 1 Halst. 1.

The king cannot grant an annuity, for his person is not chargeable as the person of a subject; but, if he grant it out of his excise, or any branch of his revenue, it is good, for there is somewhat therewith chargeable.

Salk. 58, pl. 1, per Barones Scaccar.

4. Grants tending to a Monopoly; and therein, of Things of a new Invention.

The king's grant of a monopoly, as of the sole buying, selling, working, making, or using of any commodity, is not only void by the common law, but the persons procuring such grants are said to be punishable by fine and imprisonment.

Vide tit. *Monopoly*.

And indeed the freedom of trade and labour is of such consequence, that as no person can by his own act totally debar himself of this privilege, much less can he be restrained by the king's letters patent.

3 Mod. 128; Noy, 182.

But notwithstanding this, it is agreed, that the king may for a reasonable time grant to a person the sole use of any art first invented by him; and this it seems the king might do at common law, and is therefore a matter excepted out of the statute of monopolies, 21 Jac. 1, c. 3, by which it is provided, "That no declaration in the statute shall extend to any letters patent and grants of privilege for the term of fourteen years or under, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grants shall not use; (b) so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters patent or grants

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of such privilege ; but that the same shall be of such force as they should be if the said act had never been made, and of none other."

|| (b) See 10 Barn. & C. 22.||

In the construction of this branch of the above-mentioned statute, the following points have been held :

That no new invention concerning the working any manufacture is within the meaning of this exception, unless it be substantially new, and not barely an additional improvement of an old one.(a)

3 Inst. 184. [(a) But *quere* of this, for where the questions was, Whether an addition to the old stocking-frame was the subject of a patent? Lord Mansfield said, that if the general question of law, viz., that there can be *no patent for an addition*, be with the defendant, that was open on the record, and he might move in arrest of judgment; but that that objection would go to repeal almost every patent that was ever granted: there was a verdict for the plaintiff, and 500*l.* damages; which was acquiesced in. *Morris v. Bransom*, Sitt. West. East. 1776. Bull. N. P. 76. And since that case, it hath been the generally received opinion in Westminster Hall, that a patent for an *addition* is good. But then it must be for the *addition* only, and not for the old machine too. 2 H. Bl. 489, and *Rex v. Elsee*. Sitt. West. Mich. 1785, *coram* Buller, J., Bull. N. P. 78, (last edition.)] ||11 East, R. 109, n.; *Hornblower v. Boulton*, 8 Term R. 95 *acc.*, and *vide post*, p. 137.||

β Congress shall have power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

Const. U. S. art. 1, s. 8. See Act of Congress of 4th July, 1836, 4 Story, 2504; Act of 3d March, 1837, 4 Story, 2546; Act of 3d March, 1839, 9 Laws U. S. 1019; Act of 29th of August, 1842, Pamph. Laws, 171.

A party cannot entitle himself to a patent for more than his own invention; if the patent be for the whole machine, he can maintain title to it only by establishing that it is substantially new in its structure and mode of operation.

Evans v. Eaton, 3 Wheat. 454; S. C. 3 Wash. C. C. R. 443. See *Cross v. Huntley*, 13 Wend. 385.

If the combinations existed before in machines of the same nature, and the invention consists in adding some new machinery or improved mode of operation, the patent should be limited to the improvement, and the specification describe in what the improvement consists.

3 Wheat. 454; *Earle v. Sawyer*, 4 Mason, 1.

If under such circumstances the patent includes the whole machinery, it is void.

Woodcock v. Parker, 1 Gallis. 438; *Whitmore v. Cutter*, 1 Gallis. 478; *Odiorne v. Winkle*, 2 Gallis. 51; *Barret v. Hall*, 1 Mason, 447; *Minter v. Mower*, 1 Nev. & P. 395; *Kay v. Marshall*, 5 Bing. N. S. 127; 6 Dowl. 215.*g*

That no old manufacture in use before can be prohibited in any grant of the sole use of any such new invention.

3 Inst. 184.

That if a patent be granted in case of a new invention, the king cannot grant a second patent; for the charter is granted as an encouragement to invention and industry, and to secure the patentee in the profits for a reasonable time; but when that is expired, the public is to have the benefit of the discovery.

10 Mod. 131.

δ The first inventor only is entitled to the benefit of his invention, if he

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reduce it to practice and obtain a patent therefor, and a subsequent inventor cannot oust him of his right by obtaining a new patent.

Woodcock v. Parker, 1 Gallis. 438.

An inventor cannot have two valid patents^r at the same time for the same invention.

Odiorne v. Amesbury Nail Factory, 2 Mason, 28; Morris v. Huntington, Paine, 348; Kneass v. Schuylkill Bank, 4 Wash. C. C. R. 106.

The holder of a defective patent may surrender it, and have a new one, which shall have relation to the issuing of the first, and his rights be ascertained by the law under which the original application was made.

McClurg v. Kingsland, 17 Peters, 228; S. C. 1 Howard, 202; Shaw v. Cooper, 7 Peters, 292; Grant v. Raymond, 6 Peters, 218; Phila. & T. Railroad Comp. v. Stimpson, 14 Peters, 448.

If the inventor knowingly suffers his invention to go into public use without objection, he cannot afterwards resume the exclusive right.

Mellus v. Silsba, 4 Mason, 108; Pennock v. Dialogue, 2 Peters, 16.*g*

It is held by my Lord Coke, that a new invention to do as much work in a day by an engine as formerly used to employ many hands,^(a) is not within the said exception; because it is inconvenient in turning so many labouring men to idleness.

3 Inst. 184. [(a) This notion is now exploded.]

If the invention be new in England, though the thing was practised before beyond sea, the patent is good; because the act intended to encourage new devices useful to the kingdom; and it is not material whether the discovery be owing to study or travel.

2 Salk. 447; [2 H. Bl. 491, S. C. cited by Eyre, C. J.]

β Under the 6th sect. of the act of 21st Feb. 1793, (which is similar to the 15th sect. of the act of 4th July, 1836,) if the thing secured by patent had been in use or been described in a public work, anterior to the supposed discovery, the patent is void whether the patentee knew it or not.

Evans v. Eaton, 3 Wheat. 454.

To make the patent valid, the party must be the original inventor as to the whole world.

Reutgen v. Kanowrs, 1 Wash. C. C. 168. See Pennock v. Dialogue, 2 Peters, 16; see also 7th sect. of the act of 1836.*g*

|| The Court of Chancery will grant an injunction upon possession under a patent until the right can be tried, even though it is subject to considerable doubt.

Harmar v. Playne, 14 Ves. 130. β See Sullivan v. Redfield, 1 Paine's R. 441; Isaacs v. Cooper, 4 Wash. C. C. 259. But see Collard v. Allison, 4 My. & Craig, 487.*g*

A patent for improvements to a machine is valid; but it will not restrain the use of the original machine without improvements.

Harmar v. Playne, 14 Ves. 133. β Odiorne v. Winkler, 2 Gallis. 51; Barrett v. Hall, 1 Mason, 447; Evans v. Eaton, Peters, C. C. R. 322; Gray v. James, Peters, C. C. R. 394, 399; Prouty v. Ruggles, 16 Peters, 336; Earle v. Sawyer, 4 Mason, 1.*g*

β If the patentee has sold out a moiety of his patent right, a joint action lies by himself and his assignee for a violation of it.

Whittemore v. Cutter, 1 Gallis. 429.

The making of a patented machine, to ascertain the verity of the speci-

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fication, or for the mere purpose of a philosophical experiment, and not with an intent to make profit, is not an offence within the patent laws.

Whittemore v. Cutter, 1 Gallis. 478; but see Watson v. Bladen, 4 Wash. C. C. R. 580.

The sale of the materials of a patented machine by the sheriff, on an execution against the owner, does not subject him to an action for an infringement.

Sawin v. Gould, 1 Gallis. 485.

A person who erects a machine prior to the issuing of a patent, but makes use of it afterwards, is liable to an action.

Evans v. Weiss, 2 Wash. C. C. 342.

An action for a breach of a patent right may be sustained against a corporation.

Kneass v. Schuylkill Bank, 4 Wash. C. C. 9; Phila. & T. Railroad Co. v. Stimpson, 14 Peters, 448.*g*

A patent will be granted for an improved engine which does not infringe on an existing patent: but if the improvements cannot be used without the engine for which the existing patent was granted, the improver must wait the expiration of the first patent: but no costs will be allowed where the caveat is reasonable.

Ex parte Fox, 1 Ves. & B. 67. || *β* See 8th sect. of the act of 1846, 4 Story, 2508.*g*

If a man invent a new art, and another happen to learn it before the inventor can obtain a patent, a patent afterwards obtained is void.*(a)*

3 Mod. 77, said *arguendo*. [(a) It will not be void, if the person who has learnt it has not disclosed it.] || See *Lewis v. Marling*, 10 Barn. & C. 22. || *Woodcock v. Parker*, 1 Gallis. 438; *Whittemore v. Cutter*, 1 Gallis. 478; *Morris v. Huntington*, Paine, 348; *Mellus v. Silsba*, 4 Mason, 108; *Pennock v. Dialogue*, 2 Peters, 16; *Shaw v. Cooper*, 7 Peters, 292. If a person, while in the employment of another and receiving wages, makes experiments at the expense of his employer, and in consequence of the successful results has his wages increased, and permits his employer to use his invention without other pay or compensation, and afterwards receives a patent, a license to use the invention may be presumed even against the assignee of the patent. *McClurg et al. v. Kingsland et al.*, 1 Howard, 202; and see *Morgan v. Seeward*, 2 Mees. & W. 544.*g*

If a person obtains a patent for a new invention, and another makes use of the invention without the license or consent of the patentee, an action lies against him.

Skin. 204. [Where a patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must show in what his invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this on his part is sufficient, and it is then incumbent on the defendant to falsify the specification. *Per Buller, J.*, 1 Term R. 607.] *β* For the evidence in actions for violation of patent rights, see 15th sect. of act of 1836, 4 Story, 2511; 9th sect. of act of 1837, 4 Story, 2549; *Evans v. Eaton*, 3 Wheat. 454; *Evans v. Hettich*, 7 Wheat. 453; *Evans v. Eaton*, same v. Kreamer, 1 Peters, C. C. R. 215, 322, 338; *Whittemore v. Cutter*, 1 Gallis. 476; *Odiorne v. Winkler*, 2 Gall. 51; *Stearnes v. Barrett*, 1 Mason, 153; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 9; *Dixon v. Mayer*, 4 Wash. C. C. 68; *Gray v. James*, Peters, C. C. R. 402; *Bellas v. Hayes*, 5 Serg. & Rawle, 427; *Treadwell v. Bladen*, 4 Wash. C. C. R. 703; *Bull v. Pratt*, 1 Con. 342. As to the declaration and pleadings in such actions, see *executors of Fulton v. Myers*, 4 Wash. C. C. R. 220; *Gray v. James*, 1 Peters, C. C. R. 482; *Dixon v. Mayer*, 4 Wash. C. C. R. 68; *Evans v. Kreamer*, same v. Eaton, 1 Peters, C. C. R. 215, 322, 338; *Gray v. James*, *Ibid.* 402; *Tryon v. White*, 1 Peters, C. C. R. 482; as to the damages see *Whittemore v. Cutter*, 1 Gallis. 429; *Gray v. James*, Peters, C. C. R. 394; 1 Mason, 182; *Boston Man. Comp. v. Fiske*, 2 Mason, 119; *Reutgen v. Kanowrs*, 1 Wash. C. C. R. 168; *Earle v. Sawyer*, 4 Mason, 1.*g*

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β Whether the assignee of *part* of a patent to be used, made, or sold in a particular district, can maintain a suit at law in his own name or united with the patentee, *dubitat*.

Ogle v. Ege, 4 Wash. C. C. R. 584; and see Tyler v. Tuel, 6 Cranch, 324.

He may support a suit in equity, for an injunction and account.

Ogle v. Ege, 4 Wash. C. C. R. 584; and see Tyler v. Tuel, 6 Cranch, 324.

The state courts have no jurisdiction in actions for the infringement of patent rights.

Parsons v. Barnard, 7 Johns. Rep. 141.*g*

[It will not impeach the validity of a patent that another person first made the discovery which is the subject of it, if in truth the patentee were the first who made it public, for it was the disclosure of new inventions which the statute meant to encourage. It is therefore a provision, and indispensable condition in all patents, that the patentee shall ascertain the nature of his invention, and in what manner it is to be performed: the specification is the price which the patentee is to pay for his monopoly. It hath been laid down, therefore, that the patentee must disclose the secret and specify the invention in such a way, that other artists of the same trade may be taught to do the thing for which the patent is granted, by following the directions of the specifications, without any new addition or invention of their own.(a) He must describe it so that the public may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the patentee himself uses it; and therefore, if the specification describes many parts of an instrument or machine, and the patentee uses only a few of them, or does not state how they are to be put together and used, the patent is void. And if the specification be in any part materially false or defective, if there be any ambiguity affectingly introduced into it, or any thing which tends to mislead the public, if the patentee say, that by one process he can produce three things, and fail in any one; or the specification direct the same thing to be produced several ways, or by several different ingredients, and any one of them fail; in these cases the patent is against the law, and cannot be supported. In a case before Lord Mansfield for infringing a patent for steel trusses, it appeared that the patentee, in tempering the steel, rubbed it with tallow, which was of some use in the operation; and because this was omitted, the specification was holden to be insufficient, and the patent was avoided. So, in an action for infringing the plaintiff's patent for making patent yellow; three objections were made to the patent: 1st, That after directing that lead should be calcined, it directed another ingredient, namely *minium*, to be taken, which would not answer the purpose, as it did not say whether it was to be calcined or fused, and by reference to the preceding words it would be to be calcined, which would not answer, as fusion was necessary. 2dly, That it directed any kind of fossil-salt to be taken, whereas only one kind of fossil-salt, namely, *sal gem*, would answer the purpose, because it must be a marine salt.(b) 3dly, That all the things together did not produce the effect; for the patent was to do three things, but this produced but one only. These were allowed to be decisive objections to the patent, and it was void.

2 H. Bl. 470; [and see 10 Barn. & C. 22.] Rex v. Arkwright, Sitt. West. Trin. 1785, Bull. N. P. 78, (last edition.) (a) β Whittemore v. Cutter, 1 Gallis. 478. But see Burrell v. Jewitt, 2 Paige, 134; Isaacs v. Cooper, 4 Wash. C. C. 259; 5 Tyr. 393;

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1 Gall. 109; *g* Liardet v. Johnson, Sitt. West. Hil. 1778, Bull. N. P. 79; Turner v. Winter, 1 Term R. 602. ||(*l*) See Danson & Lloyd, 33. || *β* See Gray v. Osgood, Peters, C. C. R. 394; Sullivan v. Redfield, Paine, 1 R. 441; Burrell v. Jewitt, 2 Paige, 134. For decisions on defective or false specifications, see Odiorne v. Winkler, 2 Gallis. 51; Lowell v. Lewis, 1 Mason, 182; Gray v. Osgood, Peters, C. C. R. 394; Sullivan v. Redfield, Paine, R. 441; Gray v. James, Peters, C. C. R. 394; Grant v. Raymond, 6 Peters, 218; Ames v. Howard, 1 Sumner, 48; Head v. Stevens, 19 Wend. 411; Isaacs v. Cooper, 4 Wash. C. C. 259; Burrell v. Jewitt, 2 Paige, 134; Sturtz v. De Larue, 5 Russ. 322; Morgan v. Seward, 2 Mees. & W. 544; Minter v. Mower, 1 Nev. & P. 595.*g*

The above act of parliament having excepted only patents of the sole working or making any manner of *new manufactures*, it hath been said that the foundation of all patents must be the *manufacture* itself; that there can be no patent for a mere principle, nor for the mere application or mode of doing a thing, for a method only, without having carried it into effect, and produced some new substance. On the other hand it hath been said, that though there can be no patent for a mere principle, yet for a principle so far imbodyed and connected with corporal substances as to be in a condition to act, and to produce effects in any art, trade, mystery, or manual occupation, there may be a patent; that a *method* may of itself be the subject of a patent; that Mr. Hartley's patent was solely for a *method* of securing buildings from fire: that it was not for making the plates of iron, for those were in use before: that it was not for the effect produced, for that was merely negative; but it was for his *method* of disposing the plates of iron so as to produce the proposed effect; that new methods of manufacturing articles in common use, for which a variety of patents have been granted, where the sole merit and the whole effect produced are the saving of time and expense, and thereby lowering the price of the article and introducing it into more general use, may be said to be *manufactures* in one of the common acceptations of the word, as we speak of the manufactory of glass or any other thing of that kind; that the patents in these cases cannot be for the effect produced, for it is either no substance at all, or what is exactly the same thing, as to the question upon a patent, no new substance, but an old one produced advantageously for the public: that it cannot be for the mechanism, for there is no new mechanism employed; it must then be for the *method*; that is, in the words of Lord Mansfield, for *method* detached from all physical existence whatever. Such were some of the topics of argument discussed in the Court of Common Pleas in the following case, upon which the judges of that court were equally divided.

β A patent cannot be granted for an effect only, but may for a new mode or application of machinery to produce effects.

Whittemore v. Cutter, 1 Gallis. 478. See Gray v. James, Peters, C. C. R. 394; Holden v. Curtis, 2 N. Hamp. R. 61; Evans v. Eaton, Peters, C. C. R. 387; Earle v. Sawyer, 4 Mason, 1.

A difference merely in the manner and form of applying an invention which is the same in principle with one previously used, will not justify a new patent.

Delano v. Scott, Gilpin, 489; Kay v. Marshall, 1 West. Parl. Rep. 682.*g*

A patent was granted to the plaintiff Watt for a *new invented method* of lessening the consumption of steam and fuel in fire-engines. The specification stated, that the *method* consisted of certain *principles*, and described the mode of applying those principles to the purpose of the inven-

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tion: and an act of parliament reciting the patent to have been for the making and vending of *certain engines* invented by Watt, extended to him for a longer term than fourteen years, the privilege of *making, constructing,* and selling the *said engines*. The jury found that this invention was a new and useful invention, and that the privilege vested in Watt and his assigns by the act of parliament was infringed by the defendant as charged in the declaration. They also found that the specification was of itself sufficient to enable a mechanic acquainted with the fire-engines previously in use to construct fire-engines producing the effect of lessening the consumption of fire and steam in fire-engines upon the principle invented by the plaintiff Watt. The questions proposed for the opinion of the court were, 1st, Whether the patent was good in law, and continued by the act of parliament? 2d, Whether the specification was in point of law sufficient to support the patent?

Boulton & Watt v. Bull, 2 H. Bl. 463. {Judgment being given on that verdict by the Court of Common Pleas without argument, a writ of error was brought by the defendants; and the judgment was affirmed by the Court of King's Bench: who held that the invention was the subject of a patent, and, the patentee having in his specification described his invention, his right under the patent and act of parliament was valid. 8 Term, 95, Hornblower v. Boulton.}

In consequence of the difference of opinion in the Court of Common Pleas upon this case, it was afterwards moved to dissolve the injunction which had been obtained for the purpose of trying the validity of the patent in an action; but the Chancellor said that there must be another action, and that the injunction in the mean time must be continued, and that he could not impose any terms upon the patentees in bringing the action. 3 Ves. jun. 140. Accordingly, another action was brought in the Court of Common Pleas, which came to be tried at the sittings in London, Dec. 16th, 1796, before the Lord Chief Justice Eyre, when a verdict was found for the plaintiff with nominal damages.]

||The defendants then brought a writ of error into the Court of King's Bench, which came on to be argued in Hilary Term, 1799, and it was contended for the plaintiffs in error, 1st, That the invention was not of any organized instrument or manufacture, but of mere abstract principles. 2d, That the specification was insufficient. But the court, after elaborate argument, were with the defendant in error on both points, and affirmed the judgment of the Court of C. B. The court seemed to admit, that a patent for a mere philosophical *principle* would be void, but considered that a patent for a definite improvement, and an addition to an old machine, was good.

Hornblower v. Boulton, 8 Term R. 95.

In a recent case of *scire facias* to repeal a patent, the invention was called "a new or improved method of drying and preparing malt;" and the specification stated that the invention consisted in heating malt to 400° and upwards of Fahrenheit, according to processes after described, and so treating it, that the greater part of the saccharine and amyaceous principles of the grain became changed into a substance resembling grain of a deep brown colour, and readily soluble in hot or cold water. It then proceeded to state several modes of performing this operation; but it did not describe any new machine invented for that purpose, nor the state, whether moist or dry, in which the malt was to be submitted to the process; nor the

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utmost degree of heat which might be safely used, nor the length of time to be employed; nor the exact criterion by which it was to be known when the process was accomplished. The court held the patent void, inasmuch as, 1st, the specification was not sufficiently precise; and 2d, the patent appeared to be for a different thing from that mentioned in the specification: for "a new method of drying and preparing malt," appeared to designate a mode of drying and preparing malt for making beer; whereas the specification set forth a mode of giving to malt, previously prepared, the qualities of being soluble in water, and colouring the liquor in which it was dissolved.

Rex v. Wheeler, 2 Barn. & A. 345.

So where the patent was for a machine for making paper in single sheets, without seam or joining, from one to twelve feet wide, and from one to forty-five feet in length, it was held that this imported, that paper varying in width between those extremes, should be made by the same machine; and the patentee at the time of taking out the patent, not having any machine capable of producing paper of different widths, the patent was held void.

Bloxom v. Elsee, 6 Barn. & C. 169.

So where the patent was for making a neutral salt, under the name of *Seidlitz Powder*, and the specification stated that the powder was to be made of three ingredients, mixed in certain proportions, and set out three detailed recipes, No. 1, No. 2, No. 3, for making each of the ingredients; but it appeared in evidence that these ingredients were, in fact, substances well known, and sold at the chemists, called "*Rochelle salts*," "carbonate of soda," and "tartaric acid," the union of which, in the manner prescribed, would produce *Seidlitz Powder*, the specification was held bad by Lord Tenterden; since, instead of explaining to the public, in a simple way, the composition of the powder, it led them to suppose a laborious process requisite to produce each of the ingredients.

Savory v. Price, Ry. & Moo. 1.

So if the specification omit any ingredient in the production of the article which, though not necessary, is a more expeditious and beneficial mode of producing it, the patent is void.

Wood v. Zimmer, Holt, Ca. 58.

So where the patent was for a *tapering brush*, and it appeared that the brush only differed from common brushes in the circumstance of the hairs or bristles being purposely made of unequal length, it was held that the description was improper, and the patent void.

Rex v. Metcalf, 2 Stark. Ca. 249.

So also where the patent was for an improved mode of lighting cities, towns, and villages, and the specification described merely an improved street-lamp, the patent was held by Le Blanc, J., too general in its terms.

Cochrane v. Smethurst, 1 Stark. Ca. 208.

§ A patent for "a new and useful improvement in the Steam Tow-boat." The specification described the invention as "consisting essentially in attaching the packet to the steamboat with ropes, chains, or spars, so as to communicate the power of the engine of the towing vessel to the vessel taken in tow and kept always at convenient distance, the manner of ap-

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plying the power varying with the circumstances in some measure," held bad for uncertainty.

Sullivan v. Redfield, Paine, R. 441.*g*

It was formerly laid down by Mr. J. Buller, that if the invention consisted in an improvement only, and the patent were for the whole machine, it was void.

Rex v. Arkwright, cited 11 East, 109 ; *Rex v. Elsee*, Ibid. *notâ*.

But in a case where a person had obtained a patent for a manufacturing machine, of which he duly enrolled a specification, and afterwards obtained another patent for improvements in the said machine, with the usual proviso, that the patent should be void if the patentee did not enrol a specification, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed ; it was held, that a specification containing a full description of the whole machine so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise than as the second patent referred to the first, was a performance of the condition. In this case Lord Ellenborough observed, that the difficulty which pressed most against the specification was, whether the mode of making it was not calculated to mislead a person looking at it, and to induce him to suppose that the term for which the patent was granted might extend to preclude the imitation of other parts of the machine than those for which the new patent was granted, since he could only tell by comparing it with some other patent, what were the new and what the old parts. And the force of this observation does not appear to be removed by what was said by Le Blanc, J., that "suppose the specification had merely described the improvements, still the party must have referred to the original specification, or have brought a full knowledge of it with him, before he could understand truly how to adapt the new parts described to the old machine." But the real objection to the specification did not rest on the original machine being described, for that might be necessary for the purpose of understanding the improvement, but on the two being blended together, so that it was impossible, by mere reference to the new specification, to separate the old invention from the improvement, so as to see distinctly how much was protected by the first patent, and how much by the second. And surely the proviso would have been better complied with had the new specification distinctly pointed out where the original invention ended, and the improvements began. This would have satisfied both the objects to be obtained by a specification : 1st, that of explaining to the public the invention, in order to their adopting and using it ; and 2d, that of clearly identifying what it is that is protected by the patent.

Harmar v. Playne, 11 East, 101.

Subsequent cases also confirm the doctrine, that a specification for an improvement must not set out the whole machine as the invention of the patentee. And if the description of the instrument makes no distinction between the old and new parts, it has been held that it is not helped by a plate annexed, containing a detached representation of the parts in which the improvement consists.

Bovill v. Moore, 2 Marsh, 211 ; *Macfarlane v. Price*, 1 Stark. 199.

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¶ If the invention consists of an improvement on an old machine, the patent should be for the improvement only, and the specification ought to state in what the improvement consists—if it include the whole machine it is void.

Evans v. Eaton, 3 Wheat. 454; Woodcock v. Parker, 1 Gallis. 438; Whittmore v. Cutter, Ibid. 478; Odiorne v. Winkle, 2 Gallis. 51; Barrett v. Hall, 1 Mason, 447; Lowell v. Lewis, 1 Mason, 182. As to the right and mode of disclaimer when the specification is too broad, see 7th and 9th sections of the act of 3 March, 1837, 4 Story, 2548; and for additions thereto, see sections 5 and 8. §

The patent, however, will not be vitiated, though the inventor, between the time of taking out the patent and the making of the specification, make improvements in his machine, and then in the specification claim the machine so improved.

Crossley v. Beverley, 9 Barn. & C. 63.

The invention must be new and useful, of which a jury are to judge; and if a patent is obtained for several inventions, the whole patent is void if any one of them want novelty.

Hill v. Thompson, 2 Moore, 424; 8 Taunt. 375; 3 Meriv. 624; Brunton v. Hawkes, 4 Barn. & A. 541.

¶ A patent cannot embrace *various distinct* improvements or inventions, but in each case the party must take out separate patents.

Barrett v. Hall, 1 Mason, 447. §

But if one part of the machine for which the patent is obtained turn out to be *useless*, this will not vitiate the patent, if the specification do not state that part to be essential.

Lewis v. Marling, 10 Barn. & C. 22.

¶ An invention or improvement for which a patent has been obtained, must be useful within the meaning of the patent law, or the patent will be void.

Langdon v. De Groot, Paine, 203; Dawson v. Follin, 2 Wash. C. C. R. 311; whether the usefulness be matter of fact, to be left to the jury; or as matter of law, to be decided by the court, *quære?* Paine, 203. See M. & Scott, 720; 1 Bing. N. R. 182.

An invention of an ornamental mode of putting up thread, which gave it no additional value, but made it sell more readily and at a higher price, is not a useful invention within the meaning of the patent law.

Langdon v. De Groot, Paine, 203.

By a useful invention is meant an invention which may be applied to a beneficial use in society, in contradistinction to an invention which is injurious to the morals, the health, or good order of society.

Bedford v. Hunt, 1 Mason, 302. See Kneass v. Schuylkill Bank, 4 Wash. C. C. R. 9; Dickinson v. Hall, 14 Pick. 217.

In an action on a note for a copyright, the plaintiff cannot recover if it appear on the trial that the invention was not new nor useful, although both parties acted in good faith in giving and receiving the note.

Guyer v. Cook, 3 Watts & Serg. 266. But see 1 Dev. & Bat. 315; 4 Nev. & M. 264; 2 Ad. & Ell. 278. §

If, on the other hand, one part of the described invention be not *new*, the patent will be void.

Campion v. Benyon, 3 Brod. & B. 5; 6 Moo. 71. ¶ And the patentee will not be

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permitted to show that such part is of slight value or importance in his patent. If the patent covers the whole, it is void. *Moody v. Fisk*, 2 Mason, 112.

§ An invention may be new and entitled to a patent, although parts of it were known before.

Evans v. Eaton, Pet. C. C. 322.

And as the patentee is bound by the terms of his specification, if he sums up the principle of his invention therein, and if this principle turns out to be not new, the patent cannot be supported, although it appear that the application of the principle is new.

Rex v. Cutler, 1 Stark. 354. Vide *Godson on Patents*.

The invention, however, may be considered as new, notwithstanding a model and specification of such a machine has before been brought into the country, and seen by several persons, if it do not appear that the patentee ever saw such model, &c., or that any machine was ever brought into use from it.

Lewis v. Marling, 10 Barn. & C. 22. § But see *contra*, *Evans v. Eaton*, 3 Wheat. 454; *Reutgen v. Canowrs*, 1 Wash. C. C. R. 168; and acts of Congress before cited.

5. Grants of the sole Liberty of Printing.

The king's prerogative in granting letters patent for a privilege of printing hath in many instances been disputed, and his power herein greatly doubted on this foundation and these reasons, that grants of this kind which exclude all other persons, and confine this liberty or privilege to the patentees, tend to a monopoly in enhancing the prices of books, restraining trade, discouraging industry, and in making the patentees careless and remiss in their duty.

Carter, 89; *Mod.* 256; *Skin.* 233, pl. 3; 3 *Mod.* 77; *Vern.* 275. § See *Sir W. Evans's* remarks on the cases. *Evans's Statutes*, vol. 2, part 3, class 1.

But notwithstanding these reasons, and the uncertainty that appears in some of the cases in the books on this subject, it seems the better opinion, that the king hath a peculiar prerogative in printing, which hath been countenanced and allowed in all ages, (a) and seems established on the fundamental maxims of government as being a matter of a public nature, (b) first introduced by the kings of England; (c) and in which an unrestrained liberty might be of dangerous consequence to the public. (d)

(a) *Carter*, 90; it is said that fifty such patents have been granted since Edward the Sixth's time. And that before such grants this business was managed by the king's servants. (b) In 3 *Mod.* 75, a difference is made between things of a public nature, and those only of public use; and on this distinction the court inclined to think that the letters patent granted for the sole printing of blank warrants, bonds, and indentures were not good, these being only of public use, and not so in their nature. (c) The art of printing was first at Harlem, the news of it came to Henry the Sixth, who at the desire of the archbishop brought it over at his own charge, at the expense of 1500 marks; the person assigned for this service was a merchant. *Carter*, 91.—Said to be introduced by Henry the Sixth. *Skin.* 234.—And that the king printed the Bible at his own charge. *Vern.* 275. (d) Printing is a conveyance by which men communicate their notions in the most public manner and with the most lasting impression; and therefore if they are good, this is a means to spread them and to give them a more diffusive influence; and if they are bad notions, this is likewise a method to spread the mischief wider. *Skin.* 234.

Accordingly we find this prerogative admitted in the case of *Darcy v.*

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Allen, the great case of monopolies, and the reason thereof given by Dodderidge, who argued against monopolies, because it is necessary for the peace and safety of the realm.

Moor, 637; Noy, 173.

It seems agreed, that if a book has no certain author, the king has the property of the copy, (a) and may grant it to whom he pleases; hence almanacs are deemed prerogative copies. (b)

Mod. 256. [(a) But if there was no certain author the property would not be the king's, but common. 4 Burr. 2402.] (b) So, of the translation of the Bible, Year-books, Common Prayer, and Statute-book. Lucas, 105; 2 Chan. Ca. 76.

In the 15th year of James the First, a patent for printing law books was granted to one Moor, which came to Colonel Atkins on his marriage with Moor's daughter. The Company of Stationers obtained copies of Roll's Abridgment, which they printed; and this being complained of in Chancery by Colonel Atkins, an injunction was awarded, not only against those of the company, (viz., Tyton and Roper,) who were principally concerned, but against every member thereof; and this matter coming afterwards before a committee of parliament, it was there likewise determined in favour of the patentee. And in this case it was said, that the king hath a particular prerogative over law-books, and that so he would have had if the art of printing had never been known.

Carter, 89; Mich. 18; Car. 2; 10 Mod. 106, S. C., cited to have been decreed in Chancery in favour of the patentees, and affirmed in the House of Lords. [It was this Colonel Atkins, who upon this occasion invented the fiction that printing was a flower of the crown acquired by Henry the Sixth by purchase, the first printer in England having been brought to Oxford by Archbishop Bouchier, at that king's expense. 1 Bl. R. 113.]

But the case of the greatest weight on this head, is that of Roper and Streater, which was this: Roper bought of the executors of Justice Croke the third part of his reports, which he printed; Colonel Streater had a grant for years from the crown for printing all law-books, and printed upon Roper; on which Roper brought an action on the statute 13 & 14 Car. 2, c. 33. Streater pleaded the king's grant; and on demurrer it was adjudged in B. R. for the plaintiff against the validity of the patent on these reasons: that this patent tended to a monopoly; that it was of a large extent; that printing was a handicraft trade, and no more to be restrained than other trades; that it was difficult to ascertain what should be called a law-book; that the words in the patent, *touching or concerning the common or statute law*, were loose and uncertain; that if this were to be considered as an office, the grant for years could not be good, as it would go to executors and administrators; and that there was no adequate remedy in the way of redress in case of abuses by unskilfulness, selling dear, printing ill, &c. But this judgment was reversed on a writ of error in parliament, for the following reasons: that the invention of printing was new; that this privilege had been always allowed, which was a strong argument in its favour, although it could not be said to amount to a prescription, as printing was introduced within time of memory; that it concerned the state, and was matter of public care; that it was in nature of a proclamation, which none but the king could make; that the king had the making of judges, serjeants, and officers of the law; that as to the uncertainty, these words in the patent were to be taken *secundum subjectam materiam*, and

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not to be extended to a book containing a quotation of law, but where the principal design was to treat on that subject; that as to its being an office, it was not so properly an office as an employment, which may well enough be managed by executors or administrators; and that, as to abuses, these, like all others, were punishable at common law, or the patent itself might be repealed by *sci. fa.*(a)

Skin. 234, S. C. cited and said to have been so determined in B. R. Mich. 22 Car. 2, but reversed in the House of Lords; 2 Show. 260, S. C. cited as adjudged Mich. 24, Car. 2, and there the judgment given in B. R. is called a sudden judgment, and said to be reversed in parliament; 10 Mod. 106, S. C. cited, and there said, that the validity of the patent is now established by the judgment in parliament; Vern. 120, S. C. cited and said it was not now to be shaken. (a) Though it cannot properly be called an office, yet it is a trust, and a *sci. fa.* will lie to repeal the grant. 3 Mod. 77. ¶The 13 & 14 Car. 2, c. 33, appears to have been renewed from time to time, and to have expired in the reign of William the Third. As the act prohibited the printing of law-books without the license of the Lord Chancellor, the two Chief Justices, and the Chief Baron, it became the practice to prefix such a license to all reports published after that period, in which it was usual for the rest of the judges to concur, and to add to the *imprimatur* a testimonial of the great judgment and learning of the author. The same form of license and testimonial continued till the reign of George the Second, when the judges seem to have come to a resolution not to grant any more of them. See preface to Douglas R. Sir James Burrow offered an apology for publishing his reports without an *imprimatur*. See Burrow R., Pref. viii; and see Lord Bacon's proposal to revise the office of Reporter. In Gurney v. Longman, the publisher of Lord Melvill's Trial applied for an injunction against publication of it, on the ground of an exclusive right, derived under the authority of the House of Lords, and Lord Erskine granted the injunction until the hearing, without deciding on the question of right. See 13 Vesey, 493, Evans, Stat. vol. 2, p. 20, *notd.*||

In an action of debt by the Company of Stationers against Seymour, for printing Gadbury's almanac, it was adjudged that the letters patent granted that company for the sole printing of almanacs, were good; and though the jury found that the almanac so printed contained some additions; yet having likewise found, that the said almanac had all the essential parts of the almanac that is printed before the Book of Common Prayer, the additions were looked upon as immaterial.

Mod. 256; 3 Keb. 792, S. C.; 2 Show. 260; 3 Mod. 76, S. C. cited, and a like judgment said to be given in the case of the Stationers' Company v. Wright, for printing psalters and psalms. Hil. 35, Car. 2; Skin. 234; 10 Mod. 106, like point, but no judgment.

So, an injunction was granted against Lee, on the application of the Stationers' Company, to restrain him from selling primers, psalters, almanacs, and singing psalms imported from Holland; the sole privilege of printing these belonging to that company; and that without any trial directed as to the validity of the patent.(b)

2 Show. 258. (b) An injunction was refused to stay the sale of English Bibles, and to quiet the right of patentees, because not a plain right; and therefore an issue directed. Vern. 120.—So, where the University of Oxford claimed by patent a right of printing Bibles, though the Lord Keeper was of opinion that the University patent extended to no more than were for their own use, or to some small number to compensate their charge, yet he refused to grant an injunction until the right was settled by a trial at law. Vern. 275; and vide 2 Chan. Ca. 76, 93, and *qu.* as to these cases; for injunctions seem frequently to have been since granted in favour of patentees and owners of books upon producing the patent in court under the great seal. ¶See 6 Ves. 689.||

[But notwithstanding the above decisions, this prerogative right to the printing of almanacs was strongly inclined against by the Court of King's Bench in the case of the Stationers' Company against Partridge. No judgment indeed was given in that case but it stood over, that the company

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might see if they could make it like the case of the Common Prayer Book, whether they could show that the right of the crown had any foundation in property; and it was never moved afterwards. However, in a later case of the Stationers' Company against Carnan, the question hath been again brought forward, and the right of the crown to make such exclusive grant to the company hath been expressly denied by the Court of Common Pleas on a case sent out of Chancery for their opinion.

10 Mod. 105; 4 Burr. 2402; 2 Bl. R. 1004. In consequence of this decision an act was passed, which, after reciting "that the power of granting a liberty to print almanacs and other books was heretofore supposed to be an inherent right in the crown; and that the crown had, by different charters under the great seal, granted to the Universities of Oxford and Cambridge, among other things, the privilege of printing almanacs; and that the universities had demised to the Company of Stationers of the city of London, their privileges of vending almanacs and calendars, and had received an annual sum of one thousand pounds and upwards as a consideration for such privilege; and that the sum so received by them had been laid out and expended in promoting different branches of literature and science, to the great increase of religion and learning, and the general benefit and advantage of these realms; and that the privilege or right of printing almanacs had been, by a late decision at law, found to have been a common right, over which the crown had no control, and consequently the Universities no power to demise the same to any particular person or body of men, whereby the payment so made to them by the Company of Stationers had ceased and been discontinued;" enacts, that 500*l.* a year shall be paid to each of the universities out of the moneys arising by the duties upon almanacs. Stat. 21 G. 3, c. 56, § 10. [A bill brought in by Lord North, for vesting in the Universities the exclusive right of printing almanacs, was opposed at the bar of the House of Commons by Mr. Erskine, on behalf of Carnan, and was lost by a majority of 45 votes. See Erskine's Speeches, vol. 1. Com. Journ. vol. 37, p. 388.]

In the case of *Baskett v. University of Cambridge*, the prerogative right of printing acts of parliament was sanctioned by a decision of the Court of King's Bench. That case arose upon a bill filed by the plaintiffs for an injunction to restrain the defendants from printing and selling a book, entitled "An exact Abridgment of all the Acts of Parliament relating to the Excise on Beer," &c. Both parties claimed under letters patent from the crown, the plaintiffs as the king's printers. The court were of opinion, that during the term granted by the letters patent to the plaintiffs, they were entitled to the right of printing acts of parliament, and abridgments of acts of parliament, exclusive of all other persons, not authorized to print the same by prior grants from the crown. But they thought that by the letters patent granted to the University they were *INTRUSTED with a concurrent authority* to print acts of parliament, and abridgments of acts of parliament, within the University, upon the terms in those letters patent.

1 Bl. R. 105; 2 Burr. 661.

And the following case establishes the exclusive right of the crown to print acts of parliament and books of divine service beyond all controversy. We are enabled to lay before our readers the judgment of the court as delivered by the Lord Chief Baron Skinner.

Eyre & Strahan v. Carnan, in the Exchequer, May 7th, 1781. [See the *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689.]

This is a case in which Charles Eyre and William Strahan are plaintiffs, and Thomas Carnan is the defendant.

This bill was brought to restrain the defendant from printing and publishing a Form of Prayer, which had been ordered by his majesty to be read in all churches: and for an account of the profits which have arisen from his sale of it.

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The bill states, that the plaintiffs held the office of king's printer, which was granted the 19th of December, the 2d of King George the First, to John Baskett, for thirty years in reversion after two terms which were then existing, the last of which expired the 21st of January, 1770, when the grant to Baskett took effect in possession. The grant, which was read, imports to be a grant to John Baskett of the office of printer to his majesty, and his successors, of (among other things) all Bibles and Testaments in the English language; and all Books of Common Prayer and Administrations of the Sacraments, and other Rites and Ceremonies of the Church of England, in all volumes whatsoever heretofore printed by the king's printer, or to be printed by his command; and of all other books which he, his heirs or successors, should order to be used for the service of God in the Church of England.

The interest in this grant was assigned by Baskett to John Eyre, under whom the plaintiffs claim the benefit of it; the plaintiff Eyre in two-thirds, and the plaintiff Strahan in the other third.

The bill states, that in December, 1779, a Form of Prayer was ordered by his majesty to be used in all churches and chapels throughout England and Wales upon the 4th February, 1780, that it was printed by the plaintiffs, and a sufficient number thereof circulated for sale at sixpence each, which was a reasonable price, and at which they had been formerly sold.

That the defendant Carnan had printed and sold a great number of them; and upon this ground the plaintiffs pray an injunction and account.

The defendant Carnan, in his answer, admitted the printing and selling, and he submitted to an account if the plaintiffs had the exclusive right of printing such Form of Prayer.

An injunction was granted upon filing the bill to stop the publication.

The question now is, Whether the court ought to direct the account which is prayed by the bill, for as to the continuance of the injunction in such a case, it is a mere matter of form?

Two objections are made by the defendant to this part of the relief: One is, that the price for which the plaintiffs have sold it was not a reasonable price; the second, that the right is doubtful.

As to the price, though it is proved that it might be afforded at a cheaper rate, yet it is likewise in proof that the price which has been taken by the plaintiffs is the same which had been used to be taken for like Forms of Prayer so printed; and therefore we think this not a sufficient ground for denying the account.

The next objection is to the plaintiffs' right. It has been said that courts of equity never proceed in such case to decree accounts but upon clear and undoubted rights.

That the present right, if it be one, has never received the sanction of any legal determination. That though in the great question concerning literary property the judges considered and treated the exclusive right of the crown to print acts of state and books of divine service as an acknowledged right, yet they put it upon different grounds, some upon the grounds of prerogative, others upon the ground of property; and as it is now determined that property cannot be the ground of such a right, the right itself consequently becomes doubtful. In the argument of the question respecting literary property in the House of Lords, in the case of Millar and Taylor, it was assumed by all the judges that the king's copyright continued after publication, and from thence some of them drew arguments

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in support of that right of an author after publication, insisting that property in the composition was the foundation of both; others denied that property, in the strict legal sense of the word, was the foundation of the right of the crown; but they all agreed that the crown had this right. The right therefore seemed to have been in effect recognised and established in this memorable case by the unanimous opinion of the judges, though they differed respecting the origin of it. This is certain respecting such origin, that it has ever been a trust reposed in the king, as executive magistrate, and the supreme head of the church, to promulgate to the people all those civil and religious ordinances which were to be the rule of their civil and religious obedience. There are traces of the ancient mode of promulgating the ordinances of the state yet remaining to us, suited to the gloominess of the times when few who heard them could have read them; the king's officers transmitted authentic copies of them to the sheriffs, who caused them to be publicly read in their county court. When the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the people were supplied with copies by the king's command by his patentee. This seemed a very obvious and reasonable extent of that duty which lay upon the crown to furnish the people with the authentic text of their ordinances. Our courts of justice seem to have so considered it when they established it as a rule of evidence, that acts of parliament printed by the king's printer should be deemed authentic, and read in evidence as such. As to the promulgation of religious ordinances by the king's command, or by his patentee, it is not to be expected that instances should be found of the execution of this trust by the crown during the papal usurpation of the supreme authority over all ecclesiastical matters in this kingdom. It appears, however, by a grant made in the 34th year of King Henry the Eighth, to Richard Grafton and Edward Whitchurch, of the sole right of printing the Mass-book and certain other books of divine service, that such books had never at that time been printed in England, but had been brought into this kingdom from other countries, probably from Rome; though, as the grant recites, printing was at that time arrived at great perfection here. This grant, which bears date the 28th January, the 34th year of Henry the Eighth, is to be found in Rymer, vol. 14, p. 766. The period between the time of the re-establishment of the supremacy of the crown and the completion of the Reformation under Queen Elizabeth, considering the fluctuating state of religion, was not likely to afford, and in fact has not afforded, any instance of the superintending care of the crown in printing books of divine service, except that which I have alluded to, and which I have referred to chiefly to show how the demand of the public for such books had been supplied before that time, namely, from foreign countries, and under the direction of a foreign power; but in the first year of Queen Elizabeth, the exclusive right of printing books of divine service was inserted in the same patent with the right of printing the acts of parliament, which had some time before been granted, and from that time they have been regularly granted together, and enjoyed by the king's patentee. Long usage, referable to such an origin, ought not to be shaken lightly, if there was no authority to support it; but in the case of Baskett against the University of Cambridge, the right of printing acts of parliament received the sanction of the Court of King's Bench; and in the case of Millar and Taylor, before alluded to, both the rights, as

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well that respecting acts of parliament as that respecting books of divine service, were fully acknowledged. The privilege of the patentee has in fact been always executed with the exclusion of all other printers: it is therefore, in consideration of law, a monopoly; but it is a monopoly supported by long usage, and standing upon very special grounds of necessity and public utility; for it is of manifest public utility to place in proper hands the right of such publication, as well upon account of the special care and superintendence which a trust of such importance necessarily requires, as because the exclusive right of doing or authorizing any acts in which the public is interested implies an obligation to exercise that right in such manner as to answer the purposes for which it was given; and consequently, the right now in question imposes upon the crown an obligation to publish and disperse as many books of divine service as the interest of religion and the demands of the public require. It appears, then, that the right claimed by the plaintiffs under the grant to John Baskett, is founded in public convenience, is supported by long usage, and that it has been acknowledged by the unanimous opinion of all the judges. Under such circumstances, we think it is not now to be considered as a doubtful right. If it is not doubtful, the plaintiffs are entitled to the account which is prayed; and which the court must accordingly decree. It is a matter of form to direct the continuance of the injunction; for in a case of this kind there is an end of all the effects of it; the defendant, therefore, must be decreed to account according to the prayer of the bill; and as the defendant has, by thus printing the books of divine service, invaded the rights which the plaintiffs and the king's patentees have been long in the uninterrupted possession of, the account must be with costs.]

Here it may be proper to take notice of the acts of parliament relative to this matter, and the rather as they have been urged as arguments for the king's prerogative in these concerns. The first statute is that of 25 H. 8, c. 15, (a) which expressly provides, in cases of books, that the Lord Chancellor, Lord Treasurer, or any of the Chief Justices, may set and limit the prices as well of books as of binding.

2 Inst. 744. (a) Repealed by 12 G. 2, c. 36, § 3.

In the statute 21 Jac. 1, c. 3, (§ 10,) against illegal and mischievous monopolies, it is particularly declared, that this statute should not extend to, or any ways impeach, patents for sole printing theretofore made or then after to be made.

The statute 14 Car. 2 (now expired) recites, that printing is a matter of public care, and everywhere countenances the sole privilege of printing, and seems to be founded on the king's prerogative; but was a hard law, and injurious to the liberty of the subject, in restraining the number of presses, licensing books, and imposing penalties and forfeitures.

Mod. 2, 57; 2 Show. 260. [By this statute (which expired in 1692) it was enacted, that no private person whatsoever should print or cause to be printed any book or pamphlet, unless the same should be first entered in the book of the Registrar of the Company of Stationers in London; except acts of parliament, proclamations, and such other books and papers as should be appointed to be printed by virtue of the king's sign manual, or under the hand of one of the Secretaries of State; and unless the same should be first licensed by the several persons therein directed; that is to say, all books concerning the common law were to be printed by the allowance of the Lord Chancellor the Lord Chief Justices and Lord Chief Baron, or one of them; of history concerning the state of this realm, or other books concerning any affairs of state, by one of the Secretaries of state; of heraldry, by appointment of the Earl Marshal, or, if there should

(F) Of the King's Grants and Letters Patent. (*Copy ight.*)

be no Earl Marshal, then by two of the Kings of Arms; all other books, whether of divinity, physic, philosophy, or other science or art whatsoever, by the Archbishop of Canterbury, or Bishop of London, or by their appointment respectively; or in the universities, by the Chancellor or Vice Chancellor there, provided that the said Chancellors or Vice Chancellors should not meddle either with books of common law, or matters of state or government, nor any book the right of printing which solely and properly belonged to any particular person. And the printers were to set their names, and declare the name of the author if required. But there was a proviso, that nothing therein should extend to infringe any the just rights and privileges of either of the said universities, touching the licensing or printing of books therein; nor should extend to prejudice the just rights and privileges granted by the king, or any of his royal predecessors, to any person or persons under the great seal or otherwise, but that they might exercise such rights and privileges according to their respective grants.]

By the 8 Ann. c. 19, "The author of any book not yet printed, and his assigns, shall have the sole liberty of printing it for fourteen years, to commence from the day of publishing thereof; and (a) if any person within the said time shall print, reprint, or import any such book without the consent of the proprietor in writing signed in the presence of two credible witnesses, or shall knowingly publish it without such consent, the offender shall forfeit the books and sheets to the proprietor, who shall forthwith damask and make them waste paper, and shall forfeit 1*d.* for every sheet found in his custody, either printed or printing, one moiety to the crown, the other to him who will sue in any court at Westminster."

(a) It seems also a good foundation for an action at common law, or for an application to a court of equity; but in order to entitle the party to the penalty in the statute, the terms of the act as to registering the book in the Stationers' Company, &c., must be complied with. [For the property does not vest before the book is registered. 2 Atk. 95. See also stat. 15 G. 3, c. 54, § 6.] {An action on the case for damages will lie, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed. The entry is only necessary to enable the party to bring his action for the penalty given by the statute. The right of property is absolutely vested in the author for the time limited; and the common law gives this remedy for an invasion of it. The penalties given by the statute are meant only as an additional protection. 7 Term, 620, Beckford v. Hood.} β The Constitution of the United States, art. 1, s. 8, gives power to Congress "to promote the progress of science and the useful arts by securing, for limited times, to authors and inventors, the exclusive right to their writings and discoveries." In pursuance of this constitutional authority, Congress passed the act of May 31, 1790, 1 Story, L. U. S. 94; and the act of April 29, 1802, 2 Story, L. U. S. 866; both now repealed by the act of February 3, 1831, 4 Sharsw. Cont. of Story, L. U. S. 2221; with a saving of such rights as may have been obtained in conformity to their provision. As to the necessity of complying with the provisions of the acts, see *Wheaton v. Peters*, 8 Peters, 591; *Ewen v. Coxe*, 4 Wash. C. C. 487; *Brooks v. Cock*, 4 Nev. & M. 652; 3 Ad. & Ell. 138; 1 Har. & Woll. 129; 4 Bingham, 234.γ

[And the act further directs, that if at the end of that term, the author himself be still living, the right shall then return to him for another term of the same duration.]

||Soon after the union with Ireland an act (b) was passed establishing a law of copyright throughout the United Kingdom, the main provisions of which are similar to those of the 8 Ann. c. 19, and by the 54 G. 3, c. 156, the author's copyright is extended to twenty-eight years from the day of publication, and with a further term for the residue of his life in the event of his being alive at the expiration of the twenty-eight years.

(b) 41 G. 3, c. 107.

§ 8. And by the eighth section: if the author of any book which shall not have been published fourteen years at the passing of this act shall be then living, and shall die before the expiration of the first fourteen years,

(F) Of the King's Grants and Letters Patent. (*Construction.*)

his representatives shall have a further term of fourteen years after the expiration of the first term.]]

[It was determined by the Court of King's Bench in the great case of *Millar v. Taylor*, Yates, J., *dissent.*, that an exclusive right in authors existed by the common law. But afterwards in the case of *Donaldson v. Becket*, before the House of Lords, which was finally determined 12th February, 1774, it was holden, that no copyright subsists in authors after the expiration of the several terms created by the above statute of Queen Anne. In consequence of this decision an act (a) was passed in the following year for enabling the two universities in England, the four universities in Scotland, and the colleges of Eton, Westminster, and Winchester, to hold in perpetuity their copyright in books given or bequeathed to them by authors or their representatives, upon trust that the profits arising from the printing or reprinting of such books shall be applied as a fund for the advancement of learning and other beneficial purposes of education.

4 Burr. 2303. β By the common law of Pennsylvania, an author is not entitled to a perpetual copyright. *Wheaton v. Peters*, 8 Pet. 591.γ (a) Stat. 15 G. 3, c. 54.

Although a plaintiff should establish his right only as to a *part* of a work, yet the Court of Chancery will grant an injunction to restrain the publication of such part. If an author has sold *all his interest in the copyright* he has no resulting right at the end of the first fourteen years, as against his own assignee, and will be enjoined from republishing.

Carnan v. Bowles, 2 Br. Ch. R. 80, *Ibid.* β *Rundell v. Murray*, 1 Jacobs, 311; *Lewis v. Fullerton*, 2 Beav. 6.γ

If there are several invasions of a copyright by different persons, the proprietor cannot join them all in one bill, but must file separate bills against each.

Dilly v. Doig, 2 Ves. jun. 486.

[[It seems to be illegal to publish *part* of a cause depending in a court of justice.

2 Russell R. 607.]] β The written opinions of the Judges of the Supreme Court delivered by them cannot be the subject of a copyright. *Wheaton v. Peters*, 8 Pet. 591. But law *reports* are to be considered (as to copyright) as any other literary work. *Hodges v. Welsh*, 2 Irish Eq. 266; *Saunders v. Smith*, 3 My. & Craig, 711.γ

See farther, tit. "INJUNCTION," vol. 5. [[And as to the general copyright of authors, which has no connection with this title, vide *Godson on Patents and Copyright.*]]

β And *Hudson v. Patten*, 1 Root, 133; *Gould v. Banks*, 8 Wend. 562; *Binns v. Woodruff*, 4 Wash. C. C. R. 48; *Wheaton v. Peters*, 8 Pet. 591; *Nichols v. Ruggles*, 3 Day Cas. 145; *Barfield v. Nicholson*, 2 Sim. & Stu. 1; *Lawrence v. Smith*, Jacobs, 471; *Baily v. Taylor*, 1 Russ. & My. 73; S. C., Tam. 295; *Paige v. Townsend*, 5 Russ. 395; *Delendre v. Shaw*, 2 Sim. 237; *Mawman v. Tegg*, 2 Russ. 385; *Gray v. Russell*, 1 Story, 11; *Hodges v. Welsh*, 2 Irish Eq. 266; *Tradeller v. Weller*, 2 Russ. & My. 247; *Lewis v. Fullerton*, 2 Beav. 6; *Martin v. Wright*, 6 Sim. 297; *Chappell v. Purdy*, 4 Y. & Coll. 485; *Saunders v. Smith*, 3 My. & Craig, 711; *Bentley v. Foster*, 10 Sim. 329; *Campbell v. Scott*, 11 Sim. 31; *Monk v. Harper*, 3 Edw. 109; *Sweet v. Caton*, 11 Sim. 572.γ

2. Of the Construction of the King's Grants and Letters Patent, as to their being good or void; and herein, of the King's being deceived in his Grant.

As the king's grants proceed chiefly from his own bounty, and his letters patent are records of a high nature, they ought to contain the utmost truth and certainty, and have in all times been construed most favourably for

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the king (*a*) contrary to the grants of common persons; and accordingly in a great variety of cases we find uncertainty, misrecitals, false suggestions. and all such matters as show that the king was deceived in his grant, held such reasons as have been sufficient to vitiate the grants.

Plow. 333; Co. 44; 6 Co. 55; 7 Co. 12; 8 Co. 56. (*a*) 2 Co. 24; 8 Co. 145; Hob. 224; Pollexf. 418; {3 Cain. 293, Jackson v. Reeves. See 3 Cran. 70, 71.} [*Qu.* Whether the king, proceeding by and with the advice of parliament, is in that situation, in respect of which he is under the special protection of the law, and can be considered to be deceived in his grant? 2 H. Bl. 500.]

β At common law, in order to make a grant void *in toto* for fraud or covin, the fraud or covin must infect the whole transaction, or be so mixed up with it as not to be capable of a distinct and separate consideration.

Winn v. Patterson, 9 Peters, 664; and see Smith v. Richards, 13 Peters, 26; Jackson v. Moore, 6 Cowen, 706.

A patent obtained fraudulently, or contrary to the rules of the land office, is voidable or void in a court of law as well as in equity.

Garretson v. Cole, 1 Har. & J. 370; and see Overton v. Campbell, 5 Hayw. 165; Polk's Lessee v. Hill, 2 Tenn. 154. But see Reynolds v. Flynn, 1 Hayw. 106; Sears v. Parker, *Ibid.* 126; Cupples v. ———, *Ibid.* 456; Strothers v. Cathey, 1 Murph. 401; Bagwell v. Broderick, 13 Peters, 436. Fraud in procuring the patent cannot be given in evidence in a suit for trying the title. Williams v. Wells, 1 Car. Law Rep. 383. Nor against a subsequent grantee without notice. Miller's Lessee v. Holt, 1 Tenn. 117. *g*

In a matter therefore in which such great exactness has been required, it may be necessary in the first place to lay down the following general rules:

First, That in the construction of letters patent every false recital in a part material will not vitiate the grant, if the king's intent sufficiently appears; this was so held in the case of The King and Bishop of Chester, (*b*) where the grant was made to a person as a knight, who in truth was no knight; and though the grant was held void for this reason in B. R., yet the judgment was reversed in parliament.

(*b*) 5 Mod. 297; 2 Salk. 560; Carth. 440; Skin. 651, pl. 1; Ld. Raym. 292, S. C.

Secondly, That if the king is not deceived by the false suggestions of the party, but only mistaken by his own surmises, this will not vitiate his grant; and so was the resolution in the case of The King v. Kemp. (*c*)

(*c*) 4 Mod. 277; Carth. 350; Comb. 334; Salk. 465, pl. 2; Skin. 446, pl. 4; Ld. Raym. 50, S. C.

β A legislative grant and confirmation vests an indefeasible and irrevocable title.

Terrott v. Taylor, 9 Cranch, 43; Bagnell v. Broderick, 13 Peters, 436.

Where a law is in its nature a contract and absolute rights have vested under it, a repeal of the law cannot divest those rights.

Fletcher v. Peck, 6 Cranch, 87.

A grant from the commonwealth must be avoided by matter of as high a nature and cannot be avoided by matters *dehors* the grant.

Bledsoe v. Wells, 4 Bibb, 329. *g*

Thirdly, That though the king mistakes either in matter of law or fact, yet if this is not any part of the consideration of the grant it will not vitiate it; and so is Lord Chandos's case, (*d*) which was thus: Henry the Seventh granted to Lord Chandos a manor in tail, and the same king by other letters patent reciting the former grant, and that the said Lord Chandos had

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surrendered the same to be cancelled, and that the same had been cancelled, by reason whereof the king was and is seised in fee, did grant the said manor to husband and wife, and to the heirs of the husband, &c. Now, though by the surrender of the first letters patent the estate-tail was not determined, and so the king not seised of the manor in fee as he recited he was in the second grant—for he had only a reversion in fee expectant upon the determination of the estate-tail—yet the cause, viz., *by virtue whereof we are seised in fee*, being what the king collected to be the consequence of the surrender, and not at all owing to the misinformation of the party, either as to the entail or surrender, the mistake which he made being no part of the consideration, the grant was held good.(e)

(d) 6 Co. 55, Ld. Chandos's case. (e) It is said the king may grant without any consideration. Hob. 230.—So, if the consideration be not a full one, it is no objection; for kings are supposed to be bountiful. Vern. 279.—If the king be deceived in a consideration real executory it will avoid the grant; but not in a consideration personal executed. Freem. 332. For this difference, vide 5 Co. 93; Jenk. 304; 10 Co. 67; but in 5 Co. 94, Berwick's case, it is said to be a maxim, that if the consideration which is for the benefit of the king, be it executory or executed, or be it of record, or not of record, if he be not true or not truly performed, or if any prejudice may arise to the king by reason of the non-performance thereof, the letters patent are void; and vide Moor, 393; Hob. 221; 3 Leon. 248; Plow. 454; Skin. 663; Lane, 3, 76; Dyer, 252.

β The possession of the grant of land from a state carries with it a presumption that all the legal requisites for obtaining it were complied with and the public dues paid.

Thompson v. Hauser, 2 Rep. Con. Ct. 356; Dobson v. Cocke, 1 Tenn. Rep. 314; Lessee of Brown v. Galloway, Peters, C. C. 291; Stringer v. Lessee of Young, 3 Peters, 337.g

Fourthly, That the words *ex certâ scientiâ et mero motu*, in the king's charters and letters patent, do occasion them to be taken in the most benign and liberal sense, according to the intent of the king expressed in his grant.

Bro. *Patents*, pl. 80; Plow. 337; 6 Co. 56; 7 Co. 14; 3 Leon. 249.—But, where the king in his grant recites a thing which is false, that shall not make the patent good, although the words be *ex certâ scientiâ et mero motu*. 10 Co. 112; 3 Leon. 249; Plow. 502; 3 Co. 4; Savil, 5, 37; Dyer, 300; 2 Salk. 561. ||In *Rex v. Capper*, 5 Price, 217, it was doubted whether the words *ex certâ scientiâ et mero motu* reduced a royal grant to the same rules of construction as a private grant.||

Fifthly, That though in some cases general words of a grant may be qualified by the recital, yet if the king's intent is plainly expressed in the granting part, it shall enure according to that, and is not to be restrained by the recital.

So held in the case of the king and Bishop of Chester, which is grounded on Legatt's case, 10 Co. 112.

β The validity of a legislative grant does not depend on its containing the technical terms usual in a conveyance.

Rutherford v. Greene's Heirs, 2 Wheat. 196.

The mistake of the surveyor or secretary who filled up the grant shall not prejudice the grantee.

Person v. Roundtree, Martin, 18; Philips v. Erwin, 1 Tenn. Rep. 235; Blakemore v. Chambless, 1 Tenn. Rep. 3.

A subsequent grantee cannot avoid a prior grant on account of a fraud practised in the state in obtaining it.

Dobson v. Cocke, 1 Tenn. Rep. 314; and see Smith v. Winten, 1 Tenn. Rep. 230.g

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In a *quare impedit*, it was found by a special verdict, that King Henry the Eighth was seised in fee of the manor of Leyburn in Kent, to which the advowson of the church of Leyburn is appendant, (which manor came to the king by the dissolution of monasteries, having been part of the possessions of the abbot of Gray church,) and that he granted the manor to the archbishop of Canterbury and his successors, saving the advowson; afterwards the archbishop regranted the manor and the advowson to the king, his heirs, and successors; after which the king grants the manor with the appurtenances, and this advowson (naming it in particular) which lately did belong to the archbishop of Canterbury and to the abbot of Gray church, together with all privileges, profits, commodities, &c., in as ample manner as they came to the king's hands by the grant of the archbishop, or by colour or pretence of any grant from the archbishop, or by surrender of the late abbot of Gray church, or as amply as they are now or at any time were in our hands, to Sir Edward North and his heirs; and the question was, Whether by this grant the advowson did pass? and adjudged that it did; for though here was a falsity or misrecital, the advowson never having been in the hands of the archbishop, yet that not being material, as the king could not be said to be deceived, having granted the advowson expressly by name, it was adjudged *ut suprâ*.

Mod. 195; 2 Mod. 1; 2 Keb. 442, *The King v. Sir Francis Clark*.

In the argument of the above case, the following points were laid down as supported by the authorities in the margin:

1. Where a particular certainty precedes, it shall not be destroyed by an uncertainty or a mistake coming after.

Cro. Eliz. 34, 48; Yelv. 42; 3 Leon. 162; And. 148; 2 Godb. 423; *Markham's case*; 10 Co. Legatt's case. β When natural boundaries are called for, they control the courses and distances. *Den v. Harris*, 1 Hayw. 252; *Witherspoon v. Blanks*, Ibid. 496; *Sandifer v. Foster*, Ibid. 237; *Hartsfield v. Westbrook*, Ibid. 258; *Starke v. Johnson*, 2 Rep. Con. Ct. 9; *Sumpter v. Bracy*, 2 Bay. 515; *M'Ivers' Lessee v. Walker*, 9 Cranch, 173; S. C. 4 Wheat. 444; *How v. Bass*, 2 Mass. 380; *Pernam v. Wead*, 6 Mass. 131; *Gerrish v. Bearn*, 11 Mass. 193; *Davis v. Rainsford*, 17 Mass. 207; *Mayhew v. Norton*, 17 Pick. 357; *Forest v. Spaulding*, 19 Pick. 445; *Sims' Lessee v. Baker*, Cooke R. 146; *Hickman v. Tate*, Ibid. 460; *Higly v. Bidwell*, 9 Con. 447; *Hartshorne v. Wright*, 1 Peters, C. C. R. 64; 1 Marsh. 17; 5 Monr. 175; 3 Bibb. 205; 1 Marsh. 96; 1 J. J. Marshall, 448; 9 Cowen, 661; 5 Cowen, 371; Ibid. 346; 6 Cow. 706; 8 Wend. 183.

2. That there is a difference when the king mistakes his title to the prejudice of his tenure or profit, and when he is mistaken only in some description of his grant, which is but supplemental, and not material nor issuable.

21 E. 4, 49; 33 H. 7, 6; 36 H. 8, 37; 9 E. 4, 11, 12; Lane, 111; 2 Co. 54.

3. That distinct words of relation in the king's grant are good to pass away any thing.

Bulst. 4; *Dyer*, 350; 9 Co. 24; 10 Co. 4, *Whistler's case*.

4. That when the king's grants are upon a valuable consideration, they shall be construed favourably for the patentee for the honour of the king.

3 Inst. 446, 447; 6 Co., *Sir John Moline's case*; 10 Co. 65.

β If the state have no title to the thing granted, or if the officer had no authority to issue it, the grant is void.

Wilcox v. Jackson, 13 Peters, 490; *Polk's Lessee v. Wendall*, 5 Wheat. 293; S. C. 9 Cranch, 87; *New Orleans v. The United States*, 10 Peters, 662.

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No grant of land by the United States can affect pre-existing titles.

City of New Orleans v. De Armas, 9 Peters, 224; Taylor v. Brown, 5 Cranch, 234; Voorhees v. Porter, 2 Marsh. 28.

Whenever the question is whether the title to property which had belonged to the United States has passed, it must be resolved by the laws of the United States, but whenever the property has passed according to these laws, then it is liable to state legislation, which is not inconsistent with the title vested according to the laws of the United States.

Wilcox v. Jackson, Lessee of McConnell, 13 Peters, 490; and see Attorney-general v. Parmenter, 10 Price, 378; Attorney-general v. Galway, Beat. 298; S. C. 1 Moll. 95; Cranshaw v. Slate River Company, 6 Rand. 245; Arnold v. Munday, 1 Halst. 1.

The legislature cannot take the property of one individual with or without compensation in order to give it to another.

Norman v. Heist, 5 W. & S. 171.g

One Southwell and his wife being seised of the parsonage of Horsham to them and the heirs of the husband, by deed dated 10th May, granted the same to King Henry the Eighth, in consideration whereof the same king, by his letters patent, dated the 21st July following, granted the vicarage of Harley to them and the heirs of the husband; after which, and on the 26th July following, the deed 10th May was enrolled; and it was objected, that the king was deceived in the consideration, as nothing passed by the deed before enrolment, and therefore the grant void; but notwithstanding this it was held, that here was no deceit in effect, that though the deed could not be pleaded as such before enrolled, yet it took its force and effect from the execution; and to that the enrolment shall have relation, so as to make it good *ab initio*.

Hob. 220, Needler v. Bishop of Winchester.

If the king recites the consideration to be the services of the patentee, though none were done by him, or if he recites that a manor came to him by escheat, when in truth it was his inheritance; these will not vitiate the grant; *secus*, if they are the surmises of the party.

Plow. 455, Sir Thomas Wroth's case.

Queen Elizabeth being seised of a great waste in the parish of Chipnam, granted a moiety of a yard-land in the said waste to the mayor and burgesses of Chipnam, without any certainty, name or description; and afterwards granted the said waste to H. And it was adjudged, that this first grant was void, not only against the queen, but against the second patentee, for uncertainty; and (a) that it could not, as in case of a common person, be made good by any election of the patentee.

Leon. 30, Sir Walter Hungerford's case. (a) 12 Co. 86, L. P.; and vide title *Election*.

Edward the Sixth granted *totam illam rectoriam de Dale, ac omnes decimas, &c., quæ quidem omnia, et singula præmissa* are of the true yearly value of 32l., and at the time of this grant there was a farm in the parish of Dale, in lease under a yearly rent; and though the words *quæ quidem omnia, &c.*, refer only to tithes of that yearly value, and it might be the king intended to pass no more, yet having granted *totam illam rectoriam* generally, it was adjudged, that the tithes of that farm should pass, though it made it more than 32l. *per ann.*

2 Roll. R. 118, Dixon's case.

If the king grants *totum illud manerium suum, sive totam illam rectoriam*
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sive advocacionem, &c., if he had a manor and no rectory, or an advowson and no rectory, or a manor or a rectory inappropriate, yet that which he had shall pass, because it was the effect of the grant; and in this case a rule was laid down, viz., that (a) if the king's grant may be taken to two intents, one of which may be good, and the other not, it shall be construed to such intent that the grant may take effect.

8 Co. 167; Lane, 39; Cumberland's case. (a) Dav. 45; 7 Co. 14; 5 Mod. 301. A grant may be good in part and void as to the residue, as where the title in the grantor is only to part of the land. Patterson's Lessee v. Jenks, 2 Peters, 235; Arnold v. Munday, 1 Halst. 1.

If the king grants a manor with such privileges and franchises as the dean and chapter of St. Paul's formerly enjoyed therein, it is a good grant because of the certainty to which it relates.

Cro. Eliz. 512, 513, Lord Darcie's case.

So, a grant of a manor, *habend.* to the grantee and his heirs *adeo plenè et integrè*, as it came to the hands of the king by the attainder of J S, or as is contained in such letters patent, or the like, is good according to the rule, *id certum est quod certum reddi potest*.

10 Co. 63, Whistler's case.

|| But where a liberty in a certain manor was granted to A, who granted the manor with all liberties, &c., to the crown, and the crown granted the manor again to B, with all liberties, &c., in as full and ample manner as A had it, such regrant did not pass the liberty to B, notwithstanding the words of reference; for the franchise became extinct by reunion to the crown, and being so it could not be created *de novo* by mere general words.

Rex v. Capper, 5 Price, 258; and vide Attorney-Gen. v. Marq. of Downshire, Ibid. 269.

King Edward the Sixth being seised of the manor of Cleobery, then late parcel of the possessions of the late Earl of March, whereof a great wood was parcel, grants this wood to the Lord Paget in fee; from the Lord Paget it came to the Lord Seymour, and by his attainder it returned to Edward the Sixth again; from Edward the Sixth the manor and wood came again to Queen Mary, and from her to Queen Elizabeth, who grants to the Earl of Leicester this manor, *nuper parcell. possessionum nuper comitas Marchiæ, et omnia al' ter' bosc' et hæreditamenta manerio præd' spectant,' vel ut pars, parcell' sive membrum inde antehac habita, cognita sive reputata existen'*; and it was adjudged that these woods did pass.

Dyer, 362; Co. Ent. 383, The Queen v. Thornton.

Sir Francis Fortescue being seised of a manor, grants the same to the Earl of Denbigh, except such lands as were then held for life by copy; afterwards the inheritance of this copyhold was granted to the Earl of Denbigh, and then the copyholder dies, and the earl grants by copy again, and afterwards forfeited all to the king, who granted the manor and every part and parcel thereof, or that is reputed parcel thereof, to the Earl of Clarendon; and the question was, Whether this copyhold, having been thus severed, passed by the words, *reputed parcel*, or not? and adjudged that it did.

Pollexf. 410; Freem. 207, Lee v. Browne.

If the king grants to J S lands and the mines therein contained, and royal mines are found in them, they shall not pass; for the king's grant

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shall not be taken to a double intent; (a) and the most obvious intent is, that they should only pass the common mines that are grantable to a common person.

Plow. 336. (a) Mines royal, amercements royal, escheats royal, shall not pass by general words, of all mines, amercements, and escheats. Dav. 17, 57.

So, a grant of *bona felonum*, &c., will not pass the goods of one who stands mute and will not plead.

8 H. 4, 2, pl. 2; Raym. 242, cited; and vide Roll. R. 399; 12 Co. 75; Jenk. 325; 2 Roll. Abr. 194; Owen, 155; Sand. 275; Vent. 32; Sid. 142; 2 Mod. 107.

|| And a grant of *bona et catalla felonum* will not pass stock or money in the funds, for they are not goods and chattels.

Rex v. Capper, 5 Price, 217.||

[The king granted to a ranger of a forest all manner of wood blown or thrown down by the wind, and all dead wood, and the boughs and branches of trees and wood in the forest, cut off or thrown down, and house-bote and fire-bote, for himself and the foresters and keepers. It was adjudged, that under these words, branches cut from trees felled for his majesty's use did not pass.

Attorney-General v. Lord Stawell, Anstr. 592.]

By the statute of 17 E. 2, (stat. 1,) *de Prærogativâ Regis*, the king's gift or grant of land, manors, *cum pertinentiis*, conveyeth not knight's fees, advowsons, or dowers, without express words, though it be otherwise in case of a common person.

10 Co. 64.

But, if a manor with an advowson appendant be in the hands of the king by escheat or by purchase, and he at this day give it as entirely as J S held it before it came into our hands by way of escheat, or as J S held who enfeoffed us, in such case the advowson shall pass without saying in the charter *cum feodis et advocacionibus*; because the law in such case intends that the king is apprized of his right.

10 Co. 64; Plow. 251.

So, if the king grants *ecclesiam*, the advowson passes, the (b) intent, and not the precise words, being to be regarded in the king's grants.

Latch. 248. (b) The king's grant of the vicarage of D will not pass the advowson of the vicarage of which the king was seised. Cro. Eliz. 163.

A grant of stewardship of several manors by name, without mentioning in what county, has been held good, though uncertain; notwithstanding it was objected that the king may have divers manors of the same name, and no issue can be taken which manors the king intended to pass. (c)

9 Co. 42; 4 Mod. 279, cited. (a) In pleading it ought to be alleged in what counties the manors lie, as the plaintiff did in the Earl of Shrewsbury's case, and if the other party plead *non concessit*, upon trial of the issue, the circumstances (mentioned by the court) may be given in evidence, to prove what manor was granted. Vide 9 Co. 47 a.

So, a grant to the Earl of Rutland, *a tempore plenæ ætatis*, when in truth he was of age long before, was adjudged a good patent, because it was the intent of the king, that it should commence from that time; and if that could not be, then for the time to come.

8 Co. 45; 2 Mod. 279, cited.

If the king, being tenant in tail or for life, grants *totum statum suum*, nothing passes.

Co. 46.

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So if the king, being seised in fee, grants the lands or a rent, and limits no particular estate in the gift, the grant is void, and the patentee has no freehold, either for his own life or for the life of the king, nor even an estate at will; because most grants proceeding from the application of the subject, they ought to know what they ask; and if that do not appear, nothing shall pass from the king by reason of the incertainty.

Dav. 43; 45 Roll. Abr. 845; Co. 43.

So, if lands are given by the king's letters patent to a man and his heirs male, this is void, for there can be no such tenure; and therefore the king is deceived in his grant.^(a)

Co. Lit. 27 a; Jenk. 199. (a) *Contra* of armories or arms granted by the king to a man for reward of service, as the same is descendible to the heirs male lineal or collateral. Co. Lit. 27 a.

So, if the king possessed of a chattel interest grants it in fee, this is void.

3 Lev. 134, Travel v. Garteret.

|| In 1631, the crown granted the soil along the coast of Hants between high and low water-marks. In 1784, certain persons claiming under this grant erected wharfs, docks, &c., between high and low water-marks in Portsmouth harbour; held that no good title could be made under the crown grant to this particular spot, for the crown had been in possession for 150 years after the grant, which possession raised a presumption against the grant itself, and there was no sufficient adverse possession on the part of the claimants to rebut it.

Parmeter v. Attorney-General, 1 Dow. P. C. 316; and see Chad v. Tilsed, 2 Bro. & Bing. 403.||

§ Presumptions of a grant arising from lapse of time are applied to corporeal as well as incorporeal hereditaments, but may be rebutted by contrary presumptions; they can never arise where all the circumstances are perfectly consistent with the non-existence of the grant.

Ricard v. Williams, 7 Wheaton, 59; as to presumption of grant generally, see 5 Cranch, 262; 6 Wheat. 481; 7 Wheat. 59, 536; 1 Paine, 457; 4 Mason, 397; 10 Serg. & R. 68; 8 Serg. & R. 509; 16 Serg. & R. 390; 2 Watts, 327; 8 Watts, 51; 2 Wend. 13; 3 Wend. 149; 4 Wend. 543; 6 Wend. 228; 2 Aik. 266; 4 Greenleaf, 508; 3 Har. & J. 462; 5 Har. & J. 467; 6 Har. & J. 336; 3 Rand. 563; 1 Greenl. 17; 2 Conn. 607; 2 Taylor, 131; 2 Nott & M'C. 96; 2 Rep. Con. Ct. 420; 1 Bay, 26; 7 Johns. 5; 6 Johns. 133; 2 Met. 363; 3 Pick. 408; 22 Pick. 85; 16 Pick. 137; 17 Pick. 255; 2 Tenn. R. 308, 312; 2 Hals. 6; Martin & Yer. 228; 2 Penning. 1050; 2 Hay. 12, 287; 2 Dev. 402; 4 Dev. 180; 7 Monr. 418; 4 Younge & C. 1; 1 Ohio, 316, 349; 5 Ibid. 456; N. C. Term Rep. 131; 5 Watts & S. 205.g

3. Where the King's Grantee shall partake of his Prerogative.

A chose in action may be assigned to the king, as also granted or assigned by him; and in this latter case, the grantee may either sue in his own or in the king's name. But it is said (b) to be most usual to sue in the king's name, in order to take advantage of his prerogative.

Dyer, 1, pl. 7, 8, in marg. Keil. 169. (b) 1 P. Wms. 252; 2 Ves. 181.

§ The same right of priority which belongs to the government attaches to the claim of an individual who, as surety, executor, administrator, or assignee, has paid money to the government.

Act of Congress, March 2d, 1799, sect. 65, 4 Story, 631; Mott v. Maris's Assignees, 3 Wash. C. C. R. 196; Hunter v. The United States, 5 Peters, 173. As to subrogation of sureties see Burrows v. M'Whann, Desaus. 409; Curtis v. Kitchen, 8 Martin, 706; Nicholl v. De Ende, 3 New S. 310; Torregano v. Segura, 2 New S. 159, and see New S. 132; 8 New S. 348; 1 Louis. R. 379, 410; 3 Louis. R. 479; 4 Louis.

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K. 222; 8 Martin, 483; 6 Louis. R. 63, 479; 9 Pick. 432; 4 Dana, 28; 6 Paige 521; 7 Paige, 248; 6 Gill & Johns. 36; 2 Hill, Ch. 266; 1 Bai. Eq. 311; 10 Gill & Johns. 66; 1 Greens. Ch. 145; 7 Dana, 66; 8 Watts, 384; 10 Yerg. 310; 4 Har. (N. S.) 181; 4 Dev. 360; 3 Lit. 414; 12 Wheat. 596.

J S attainted of treason, and being possessed of certain obligations which became forfeited, the king granted them to the wife (a) without any words enabling her to sue for them in her own name; and she having sued in her own name, it was held that she well might; for the law allowing the grant good, gives by implication the grantee the necessary means of attaining the benefit of it.

Dyer, 30; Sav. 2. (a) Owen, 113; Cro. Jac. 82, like point.

So, where J S in an action on the case recovered 4000*l.* damages, and afterwards became outlawed in a personal action; and the king having granted this 4000*l.*, it was held, that the grantee may levy this debt by action in his own name, or by extent in the king's name; though he has no words in his grant to sue it in the king's name, as is usual in such case; but in this case an assignment by the king's patentee was held void. (b)

Cro. Jac. 179; The King v. Twine, Sav. 133. (b) 2 Lev. 49, 50; Bro. Disseis. 65.

If the king enters without title, or seizes lands by a void or insufficient office, he is no disseisor; but, if the king (c) by letters patent grants lands so seized, and the patentee enters, he is a disseisor; because he has time to inquire into the legality of his title, which the king is supposed to want leisure for.

(c) That the king's patentee shall not take advantage of the maxim *nullum tempus occurrit regi*. Poph. 26.

The king may distrain for his rent-service in any lands of his tenant; so, if he hath a rent-charge issuing out of certain lands, he may distrain in any other lands of the party; but his grantee cannot do so.

Bro. Prerog. 68.

§ On a *scire facias* to forfeit a grant of land for non-payment of rent reserved, held, that if the payment at the place appointed had become impossible in consequence of a war or revolution, it was no forfeiture.

People of Vermont v. The Society for the Propagating the Gospel, 1 Paine, 652.

In such a case another place of payment, or officer to receive it, should have been appointed and notice given to the defendant.

People of Vermont v. The Society for the Propagating the Gospel, 1 Paine, 652.

Where a right of re-entry is claimed on the ground of forfeiture for non-payment of rent, there must be proof of a demand of the precise sum due at a convenient time before sunset on the day it was due—upon the land in the most notorious place of it, although there be no person there to pay it, and that there was no sufficient distress between the day it fell due and the day of the demise.

Conner v. Bradley & Wife, 1 Howard, 211; Lessee of Livingston v. Kipp, 3 Wendall, 230; McCormick v. Connell, 6 Serg. & R. 151; Newman v. Rutter, 8 Watts, 51; Jackson v. Collins, 11 Johns. 1.

A tender of rent on the land is sufficient, if no other place of payment be specified.

Walter v. Dewy, 16 Johns. 222.

Originally all wrecks were in the crown, and the king has a right to a way over any man's ground for his wreck; and the same privilege goes to the grantee thereof.

6 Mod. 149.

PRIVILEGE.

PRIVILEGE is an exemption from some duty, burden, or attendance, with which certain persons are indulged, from a supposition of law, that the stations they fill, or the offices they are engaged in, are such as require all their time and care; (a) and that therefore without this indulgence it would be impracticable to execute such offices to that advantage which the public good requires.

β (a) Taken in active sense, privilege is a particular law, or a particular disposition of the law, which grants certain special prerogatives to some persons contrary to common right. In its passive sense, it is the same prerogative granted by the same particular law. Bouv. L. D. h. t. §

Under this description we shall consider,

- (A) The Duties and Offices from which certain persons by reason of their Privilege are exempt.
 - (B) The particular privileges in Suits allowed Officers and Attendants in the Courts of Justice: And herein,
 - 1. *Who are the Officers entitled to Privilege.*
 - 2. *Of the Privilege and Protection allowed those whose Attendance is necessarily required.*
 - 3. *In what Cases this Privilege is to be allowed.*
 - 4. *Of claiming and allowing Privilege; and therein, that it must be set forth and pleaded.*
 - 5. *How privileged Persons are to sue and be sued.*
 - 6. *Whether there can be Privilege against Privilege.*
 - (C) Privilege of Peers and Members of Parliament.
 - 1. *Who are the Persons entitled to this Privilege.*
 - 2. *How far this Privilege extends to their Servants and Attendants.*
 - 3. *In what Cases this Privilege is to be allowed.*
 - 4. *Of the Commencement and Continuance of this Privilege.*
 - 5. *How Privilege is to be claimed and taken Advantage of.*
 - 6. *What shall be deemed a Breach of Privilege.*
 - 7. *Of the Proceedings in Courts by and against Persons entitled to Privilege of Parliament.*
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- (A) The Duties and Offices from which certain Persons by reason of their Privilege are exempt.

THE king's servants are privileged in some cases in respect of their necessary attendance.

2 Inst. 531, 704; Skin. 21, pl. 21; 2 Chan. R. 196; 2 Show. 84, pl. 72.—Privileged from arrests. Raym. 159. [It is an established rule of law, that the king cannot grant an exemption from any duties but those he has a title to impose; and which are *personal* to him, and distinct from the general interest of the realm. 2 Roll. Abr. 198, (K), pl. 1, 202, (T), pl. 2. Therefore where a statute enacted, that the lord-lieutenants of the several counties should "charge any person with horse and arms for the county

(A) Duties, &c., from which Privileged Persons are exempt.

where his estate should lie," towards the maintenance of the militia, it was holden, that a charter granted to the College of Physicians, exempting the members "from bearing or providing arms to serve in the militia in London and Westminster, or the suburbs or within seven miles thereof," did not exonerate one of the members from the charge, though his estate lay within seven miles of London. *Sir Hans Sloane v. Lord William Paulet*, 8 Mod. 12. But it should seem, that it is competent to the crown to grant an exemption from being pressed; because in the crown alone lies the power of issuing press-warrants. Cowp. 520, 521;] || and vide 16 East, 165.||

One Swallow (*a*) being the king's minter or moneyer, was elected an alderman of London, but refusing to take the oath of an alderman was fined, and committed for the fine by the judgment of the court in London, which appeared on the return to a *habeas corpus*. He alleged in B. R. that he was an officer of the mint, and that, by an ancient charter of privilege granted such officers, he ought to be exempt; and offered to plead this matter to the return of the *habeas corpus*, as a matter consistent with him to do: but this the court refused to admit, as he might have pleaded it in the court below: however, he was directed to set it forth in a suggestion in the crown office, which he did, and obtained a writ of privilege, which at another day he brought into court. The recorder objected to its being allowed against the ancient privilege of the city, confirmed by acts of parliament; but the court held it a reasonable privilege, the office being ancient, and the attendance necessary elsewhere. They said, that if there were not persons sufficient besides to serve, this might have been shown, and it would be a good reason to suspend his privilege; and though aldermen were not mentioned in the charter, yet, as superior and inferior officers were mentioned, as, mayor, sheriff, escheator, collector of tenths, &c., they said the middle were included; and accordingly he was discharged.

(*a*) 1 Sid. 287; 2 Keb. 50, 54, S. C., Swallow's case.

But, where some persons belonging to the custom-house, London, were indicted for not keeping watch and ward, though they pleaded a special privilege granted them by the king to exempt them from this duty; yet, as they did not aver that there were sufficient persons besides, the plea was overruled.

Sid. 272; Keb. 933, *The King v. Clark*.

The king by his charter may exempt some persons from serving on juries if there be enough besides. But such charter of exemption does not extend to the Court of King's Bench, unless particularly named; nor to any case where the king is concerned, unless it has these words, *licet tangat nos*. And the sheriff must not return such privilege, but the persons who would have the benefit of it must claim it.

Sid. 443; Lev. 159; Raym. 113; Keb. 840. ||See tit. *Jury*.||

A juror surmised at the bar, that he was tenant in ancient demesne, and had his charter in his hand, and prayed to be exempted from serving on the jury; but the court did not regard it, but caused him to be sworn. It was said he might have his remedy against the sheriff; (*b*) or if he had made default and lost issue he might show his charter in the exchequer upon the amercement estreated, and there he should be discharged.

Leon. 207, *Mills v. Snowballs*. Vide title *Ancient Demesne*. (*b*) *Qu.*; and vide Co. Lit. 130; Sid. 243.

β A person who holds any office or situation of a *public* nature which cannot be performed by deputy, is entitled to be excused from serving on

(A) Duties, &c., from which Privileged Persons are exempt.

a jury; otherwise, where the trust is of a *private* nature, or can be performed by deputy.

Piper's case, 2 Brown, 59; and see *Cortelyon v. Van Brundt*, 1 Johns. 313; *Hogg's case*, 2 Taylor, 254. Persons above the age of sixty years are excused from serving on juries, if they choose to claim the privilege. *The State v. Miller*, 2 Blackf. 35. But are not excluded from serving. *Sutton v. Petty*, 2 South. 506. All artificers and workmen employed in the armories of the United States, are exempted, during their term of service, from service as jurors in any court. Act of Congress, 7th May, 1800, sect. 4th, 1 Story, 777.

Where a peer is party, either plaintiff or defendant, two or more knights (a) must be returned on the jury; and it was said, that in Cumberland there was but one freeholder who was a knight besides Sir Richard Stote, a serjeant at law; and the court were of opinion, that rather than there should be a failure of justice, a serjeant at law ought to be returned a jurymen; for that his privilege would not extend to a case of necessity.

2 Mod. 182; Mod. 226; *Dyer*, 107, pl. 27. (a) See 24 G. 2, c. 18, § 4. No challenge to the array for want of a knight.

If a sworn attorney, (b) or other officer of any of the courts of Westminster-hall, be chosen constable, he may have a writ of privilege for his discharge. And it is held, that such officers shall have this privilege, not only where there is no special custom concerning the election of constables, but also where they are chosen by a particular custom in respect of their estates or otherwise; for that no such custom shall be supposed to be more ancient than the usage of those courts, and therefore shall give way to them.

March, 30; *Noy*, 112; *Cro. Car.* 389; 2 *Keb.* 477. (b) This privilege is thought to extend to barristers at law. 2 *Hawk. P. C. c.* 10, § 39.

So, an attorney, being chosen churchwarden of a parish, may have a writ of privilege; so, a writ of privilege was signed by all the Court of C. B. for G, a clerk under the *custos breviarum*, to free him from being a soldier. And it is therein recited, that it is the privilege of the court, that neither the attorneys nor clerks of it should be elected to any office without their consent, but ought to attend the service of the court.

2 *Roll. Abr.* 272; *Palm.* 392; *Lev.* 265; *Vent.* 16, 29; *Raym.* 180; *Cro. Car.* 11, 389, 585; and *Co. Ent.* 436, like writ of privilege.

§ An attorney-at-law is privileged from serving as overseer of the poor, supervisor of the public roads, or constable.

Respublica v. Fisher, 1 *Yeates*, 350. But he is not exempt from serving in the militia. 1 *Yeates*, 350; In the matter of *Bliss*, 9 *Johns.* 347.

Gale, an attorney of B. R., was elected one of the twenty-four burgesses in the town of ———, and because he refused to serve was fined ten pounds: then he procured a writ of privilege, which he showed; after which debt was brought for the ten pounds in B. R., and it was prayed after imparlance to stay the action against Gale, because that after imparlance he could not plead his privilege to the action; and *Stone's case* was cited, who was elected reeve to collect the rents of the lord at Harrow the Hill, and was discharged by his writ of privilege. The court held, that the privilege of an attorney was a good discharge in this case: they likewise held, that the writ of privilege had a retrospect to the whole, and that being discharged from the office, he was discharged from the fine also.

Trin. 27 *Car.* 2, in *B. R.*, *Gale's case*; 3 *Keb.* 512, *S. C.*

(A) Duties, &c., from which Privileged Persons are exempt.

It seems to be the better opinion, that if a captain of the king's guards, a gentleman of quality, or practising physician, (a) be chosen constable in a parish, where there are persons sufficient to serve, and in which there is no special custom directing such election, that every such person may be relieved or discharged by the Court of King's Bench, which hath a supreme and mandatory power in cases of this nature: but in cases of a special custom in respect of estate or otherwise it hath been holden, that such persons are not to be excused; and the rather, because they may execute the office by deputy.

Sid. 272, 355, 431; Mod. 22; Lev. 233; Keb. 439, 933, 578. (a) Members of the College of Physicians in London exempted by the statute 32 H. 8, c. 40. [But the equity of this act, it should seem, does not extend to other physicians not mentioned in it. 2 Hawk. P. C. c. 10, § 44.]

By the statute 5 H. 8, c. 6, surgeons are exempt from serving parish offices.

2 Keb. 578.

By the 6 W. 3, c. 4, "All persons using the art of an apothecary, who shall be brought up and serve in the said art as apprentices seven years, shall be exempted from the offices of constable, scavenger, overseer of the poor, and all other parish, ward, and leet offices, and from serving on juries."

If an alderman of London has a house in the manor of R, in the county of Essex, (in which manor the lord has by prescription a leet,) and he as an inhabitant is chosen constable there, yet he is not compellable to serve; for that as an alderman he is bound to be present in the city for the good government thereof. (b) And a writ was awarded to the lord of the manor to discharge him.

Cro. Car. 585; Jon. 462, Alderman Abdy's case. (b) At the assizes at Croydon, 1777, Lord Mansfield refused to fine Mr. Plumbe, returned as a special jurymen in a case before his lordship, because at that time he was one of the sheriffs of London.

One Price, being high constable for the hundred of Wanstead, was elected overseer of the poor in the parish of St. Peter the Poor in London; and upon producing the certificate of the justices of the peace of the county, and their certifying that his service in the office of constable was of great use and importance to his majesty, he was by the Court of B. R. discharged from the office of overseer till such time as his office of constable expired.

2 Jon. 46, Price's case.

But where A was indicted for not taking on him the office of high constable, and the question on a special verdict was, Whether a tenant in ancient demesne may be made constable of an hundred which reaches further than the demesnes? it was adjudged that he might.

Vent. 344; 2 Show. 75, pl. 59, The King v. Bettesworth.

Doctor Lee, Archdeacon of Rochester, having lands within the level, was made an expeditor by the commissioners of sewers, whereupon he prayed his writ of privilege, which was granted; for the register is *vir militans deo non implicetur secularibus negotiis*; and the ancient law is, *quod clerici non ponantur in officia*. Clergymen are not to serve in the wars.

Vent. 105; Lev. 303, Dr. Lee's case, and Mod. 282, S. C., where it is said, the

(A) Duties, &c., from which Privileged Persons are exempt.

reason was, because the land was in lease, and the tenant, if any, ought to do the office. [The like point was determined in the Vicar of Dartford's case, 2 Str. 1107, more fully reported in Andr. 353, under the name of Chambers' case. The court, in delivering their judgment in this last case, said, that upon the authority of Dr. Lee's case, and 6 Mod. 140, (*infra*,) they were clearly of opinion, Mr. Chambers, the vicar, was not compellable to exercise the office: the first case being directly in point, and standing upon both the reasons given in the books; and the other being contrary to the distinction taken between an office at common law, and under act of parliament. And Lee, C. J., added, that the usage which had been offered of several clergymen having actually served the office since Dr. Lee's case, had no influence on the present question; for the exemption being claimed as a privilege, any person entitled to it may certainly waive it, if he pleases.]

A writ of privilege was moved for to have a clergyman, who appeared to have no cure for souls, privileged from the office of overseer of the poor, which three judges thought reasonable; but Holt, C. J., seemed against it, who thought that their privilege of exemption was only extendible to their spiritual revenues; and if in any case they were personal, it was only from common law offices, especially if they were without cure, as in the present case; and in deference to his opinion it was directed to be moved for again.

6 Mod. 140. [By 1 W. & M. c. 18, § 11, *dissenting ministers*, and by 31 G. 3, c. 32, *Roman Catholic priests*, are, under certain conditions, exempted from serving all county, ward, and parish offices, and therefore a *clergyman of the Church of England* may be supposed to be exempted; for it cannot be imagined, that the legislature meant to confer greater privileges upon *sectaries*, than the *regular clergy* were understood to possess; but there does not appear to be any adjudged case precisely to this point. See note to last edition of 6 Mod. *supra*.]

^B A clergyman is privileged from serving as guardian of the poor—although he may at the same time pursue secular business for the support of his family.

Guardians v. Green, 5 Binn. 554. Also from serving as a juror, constable, or overseer of the highway. *Per* Tilghman, C. J., *Ibid.*

In the case of Evedon, an attorney of B. R., it was determined that he was not obliged to serve in the train-bands, or to find a deputy for that purpose, although the array and muster of these is directed by several acts of parliament which contain general words; for his privilege shall exempt him from offices, as well those created by statute as those at common law, if there be not an express clause for taking away his privilege.

Mich. 9 G. 2, in B. R., Evindon's case; 2 Stra. 1143. [Heaton's case, Barnes, 1143, S. P. But since the 2 G. 3, c. 20, § 42, the militia acts having allowed a commutation of service into a payment of 10*l.*, it hath been holden, that an attorney is not entitled to his writ of privilege to exempt him from serving in the militia, it being no longer deemed to be a *personal* service, upon which ground alone he could be entitled to it. Gerard's case, 2 Bl. R. 1123. By 26 G. 3, c. 170, § 27, "No peer of the realm, nor any person who shall serve as a commissioned officer in any regiment, troop, or company in his majesty's other forces, or in any one of his majesty's castles or forts, nor any non-commissioned officer or private man, serving in any of his majesty's other forces, nor any commissioned officer serving, or who hath served four years in the militia, nor any person being a member of either of the universities, nor any clergyman, nor any teacher of any separate congregation, nor any constable or other peace-officer, nor any articulated clerk, apprentice, seaman, or sea-faring man, nor any person mustered, trained, and doing duty, or employed in any of his majesty's docks or dock-yards for the service thereof, or employed and mustered in his majesty's service in the Tower of London, Woolwich Warren, the several gun-wharfs at Portsmouth, or at the several powder-mills, powder magazines, or other storehouses belonging to his majesty, under the direction of the Board of Ordnance, nor any person being free of the Company of Watermen of the river Thames, nor any poor man who has more than one child born in wedlock, shall be liable to serve personally, or provide a substitute to serve in the militia;

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and no person having served personally, or by substitute, according to the directions of this, or any former act, shall be obliged to serve again, until by rotation it shall come to his turn : but no person who has served once as a substitute shall by such service be exempted from serving again, if he shall be chosen by ballot."]

β The Vice-President of the United States, the officers, judicial and executive, of the government of the United States, the members and officers of both houses of Congress, custom-house officers and their clerks, all post officers, stage-drivers employed in conveying the mail, ferrymen employed at ferries on post-roads, inspectors of exports, and pilots, mariners, and all other persons exempted by the laws of the respective states, are exempt from militia duty.

Act of Congress, May 8, 1792 ; 1 Story, 253.

All artificers and workmen employed in the armories of the United States are exempted, during their term of service, from all military service and service as jurors in any court.

Act of 7th May, 1800, sec. 4 ; 7 Story, 777.

An attorney is not privileged from serving in the militia.

Respublica v. Fisher Mifflin, 1 Yeates, 350 ; case of Bliss, 9 Johns. R. 347.^g

[An attorney, it hath been holden, is exempted, by the privilege of the court to which he belongs, from serving the office of sheriff in a corporation ; though he be a member of the corporation, and resident in the corporate town, before and when he is admitted an attorney.

Mayor of Norwich v. Berry, 4 Burr. 2113 ; 1 Bl. R. 636, S. C.

A, who was a justice of peace, and resided at Blackheath in Kent, and in London, being appointed constable in London, moved for a writ of privilege. But the court denied it, saying they had nothing to do with it, but the proper method was under the statute of Car. 2, to apply to the sessions.

Delamott's case, 2 Stra. 698.

Barristers are considered as exempt from serving the office of sheriff.

Per Lord Mansfield, 4 Burr. 2114.

It is permitted by 1 W & M. c. 18, and 13 Geo. 3, c. 20, to dissenters and Roman Catholics to serve the office of constable by deputy.

The officers of the excise and customs claim, and have been allowed in several instances, their writ of privilege from the Court of Exchequer, as officers of the court, to be discharged from offices. One of these writs of privilege that are now in use, was settled by Lord Chief Baron Comyns himself.

Anstr. 216.

So the foreign apposer was allowed his writ of privilege to exempt him from serving the office of constable.

Harrison's case, Bunb. 24.

One Martin, who was deputy to the usher of the customs, being chosen head-borough for Westham in the county of Essex, moved for a writ of privilege to discharge him from that office, which was granted. Upon the authority of this precedent it was moved for a writ of privilege for the chief accountant to the commissioners for victualling the navy, who was chosen churchwarden of the parish of St. Botolph, Aldgate, his attendance upon the king's business and the revenue of the crown being, it was urged, equally concerned as in the other case. But the court thought

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this case not like the other case, for it did not appear here, that there was a clause of exemption in the patent constituting the commissioners of victualling, as in the other case there was for *all* officers, &c.; and the true reason they went upon in the other case was, for that *all* officers in the customs are bound to an attendance in the Court of Exchequer, which, in this case, the party applying for this writ of privilege is not.

Bishop v. Lloyd, Bunb. 255.]

|| An officer of the customs is exempted from serving the office of overseer of the poor, though he has not his writ of privilege at the time. So also is the clerk of the treasury of the Court of Common Pleas, since his duties require personal attendance.

Rex v. Warner, 8 Term R. 375 ; *Ex parte* Jefferies, 6 Bing. 195.

A certificate granted upon 10 & 11 W. 3, c. 23, exempting the person prosecuting to conviction any one guilty of burglary from serving parish and ward offices, exempts the party from the office of petty constable for a township within, but not co-extensive with, the parish where the burglary was committed ; for the term *parish offices* in the act, is to be taken in a liberal and popular, and not in its strict and technical sense.

Mosely v. Stonehouse, 7 East, 174.||

(B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice : And herein,

1. *Who are the Officers thus entitled to Privilege.*

THE officers, ministers, and clerks of the courts in Westminster-hall are allowed particular privileges in respect of their necessary attendance on those courts ; they are regularly to sue and be sued in the courts they respectively belong to, and cannot, except in certain cases, be impleaded elsewhere ; which privilege arises from a supposition of law, that the business of the court or their client's causes would suffer by their being drawn into any other than that in which their personal attendance is required.

2 Inst. 551 ; 4 Inst. 71 ; Vaugh. 154 ; Dyer, 377 a, pl. 30.

Anderson, C. J., of the C. B., brought trespass by bill for breaking his house in the city of Worcester, against a citizen of said city ; the mayor and commonalty came and showed a charter granted by Edward the Sixth, and demanded consuance of pleas ; but it was refused, because the privilege of that court, of which the plaintiff was a chief member, is more ancient than the patent ; for the justices, clerks, and attorneys of this court ought to be here attending to do their business, and shall not be impleaded or compelled to implead others elsewhere ; and this privilege was given this court upon the erection of it.

3 Leon. 149, Lord Anderson's case.

An attorney, so long as he remains on record, shall have his privilege ; and therefore where it was moved, that JS should put in special bail, being an attorney at large, and having (a) discontinued his practice, the court said, that attorneys at large have the same privilege with the clerks of the court, and are to appear *de die in diem* ; and they were not satisfied that he had discontinued his practice.

Bro. title *Attorney*, 67 ; title *Bill*, 24 ; Vent. 1, Sir John How v. Walley. (a) That if an attorney absents himself for a year, by the new rules he loses his privilege. 2 Lill. Reg. 371, *per* Glyn, C. J. See *acc.* 4 Burr. 2114 ; *β* Brooks v. Patterson, 2 John. Ca. 102 ; Coleman Ca. 133 ; Dyson v. Birch, 1 Bos. & Pul. 4.g

(B) Privileges in Suits of Officers of Courts, &c.

§ In Pennsylvania, an attorney is not privileged from arrest on a *capias*, (a) nor in New York, if the arrest is made while he remains at home. (b) But he is so privileged while attending in court. (c)

(a) *Respublica v. Fisher*, 1 Yeates, 350. (b) *Curry v. Russell*, 4 Wend. 204; — *v. Bell*, 18 Johns. 52; *Foster v. Garnsey*, 13 Johns. 465; *Gibbs v. Loomis*, 10 Johns. 463. (c) *Gilbert v. Vanderpool*, 15 Johns. 252.

No attorney or other officer of the court is ever privileged from arrest when sued with another, though during his attendance in court.

Gay v. Rogers, 3 Cowen, 368; *Tiffany v. —*, 13 Johns. 252; *Chenango Bank v. Root*, 4 Cowen, 126; but see 2 Dowl. P. C. 278; 2 C. & M. 146.

When an attorney is actually attending court for the purpose of making a motion, if he be arrested on a *ca. sa.*, he will be discharged from the arrest.

Humphreys v. Cummings, 5 Wend. 90; 18 Johns. 52. See 9 Johns. 216; 2 Caines, 387; 2 South. 718; 3 Cowen, 22; 1 Y. & J. 199, 204; 1 Dowl. 283; S. & Scully, 78, 81.*g*

But, where J S was arrested in B. R., and after the arrest he procured himself to be made an attorney of C. B., and prayed his privilege, it was disallowed, because it accrued *pendente lite*.

2 Roll. R. 115.

|| A defendant who is sued by bill as an attorney of the K. B., not being so, may set aside the proceedings as irregular.

5 Maule & S. 324.||

In debt against the warden of the Fleet, by bill of privilege, he refused to appear; the court doubted how they could compel him, as they could not forejudge him the court, he having an inheritance in his office; but it being surmised that he made a lease of his office, it was held that he should not have his privilege, for that the lessee, and not he, was the officer during the lease.

2 Leon. 173, *Gittison v. Tyrrel*.

So, if the marshal of B. R. grants his place for life, the grantor has no privilege during that time. (d)

Vent. 65. (d) *Qu.* if he can now grant it? Vide the stat. 27 Geo. 2, c. 17, whereby the power of appointing the marshal is re-vested in the crown.

A clerk in B. R. was sued in an inferior court for a debt under five pounds, and had a writ of privilege allowed: for the stat. 21 Jac. 1, c. 23, never intended to take away the privilege of attorneys.

Palm. 403.

In the Court of Exchequer (e) there are three sorts of privilege; 1st. As debtor. 2dly. As accountant. 3dly. As officer.

Hard. 365. (e) Where an officer or minister of the Exchequer is one of the parties in a personal action, he shall be sued in that court, because his absence might hinder the king's affairs; so, a prisoner of this court, for any accountant that is entered into his account, shall have the like privilege; and a farmer or one indebted to the king, for the king's more speedy satisfaction of his debt or duty, may sue his debtor by a *Quo minus* in the Exchequer. 2 Inst. 531. [That officers of the revenue, as such, are privileged to be sued in the Exchequer in all cases, is a doctrine and opinion which has been supposed to obtain in the Exchequer. However, the general privilege to be sued in all personal actions in that court hath been doubted by very great authority: for it seems that the court has always confined the privilege of removing the action to those cases in which the action has been brought for something which hath been done by them in the execution of their office. Lord C. Baron Eyre's argument in *Cawthorn v. Campbell*, Anstr. 216. And this doubt of the learned judge is supported by the case of *Barkley v. Walters*, Bunb. 306, where a custom-house

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officer had seized two cables, one of which only was forfeited; and an action being commenced against him in the Court of King's Bench, the Court of Exchequer refused to remove it, because it did not appear but that the action was brought in B. R. for the other cable only.] β As to the removal of suits against officers of the revenue of the United States, see act of Congress of 2d March, 1833, c. 356, sect. 3, 4 Story, 2341; Conkling's Treat. 61, (2 ed.) γ

J S was sued in an action of battery in London, which he removed into B. R., and afterwards prayed his privilege in the Court of Exchequer; and upon the puisne baron's coming into court, and bringing the red-book of the Exchequer, which showed that he was an escheator, and so an accountant to the king, the privilege was allowed.

Noy, 40, Walrend v. Winroll.

If one holds of the queen as of her manor, he shall not have the privilege of the Exchequer for that cause; but (a) if the king grants tithes, and thereupon reserves a rent *nomine decime*, and a tenure of him, there he shall have privilege.

2 Leon. 21, Lightfoot v. Butler. (a) In 2 Leon. 146, it is said, that the tenant of the king in chief, or he who pays first fruits, or he who holds of the queen in fee-farm, shall not have privilege. *Qu.* and vide 3 Leon. 258.—That commencing a suit in the Exchequer on a *quo minus* as debtor to the king, is not such a privilege as will oust an inferior jurisdiction; for it is now grown the common method of suing in those courts. Hard. 316; 2 Vent. 362.

On a *latitat's* being sued out against the commissioners of the treasury, the puisne baron of the Exchequer came into the Court of B. R., and brought into court the red-book of the Exchequer, which is deemed a record in that court; and thereby it appeared, that the treasurer had privilege of being sued only in that court; and the patent being produced in court which constituted the defendants, &c., and granted them the office of treasurer of England, their privilege was allowed them without putting them to bring a writ of privilege, the court grounding themselves on the record before them. (b.)

2 Show. 299, pl. 301; Lampen v. Sir Edward Deering et al. (b) Difference between officers that are of record and not. Hard. 164.

It hath been held, that the treasurer of the navy is *eo ipso* an accountant; and that an accountant's privilege will hold against a special privilege in another court, as officer of the court or otherwise; though it be not alleged that such an accountant is (c) entered upon his account; for that every accountant may be attached by the court to make up his accounts, and must attend for that purpose *de die in diem*.

Hard. 316; vide Moor, 763; 2 Inst. 23, 551; Bro. *Privilege*, 17. (c) But if an accountant has finished his account and reduces it to a debt, he shall have no privilege but as a general debtor. Hard. 365.

In debt in B. R., against J S, he pleaded to the jurisdiction that none of the privy chamber ought to be sued in any other court, without the special license of the lord chamberlain of the household, and that he was one of the privy chamber: on demurrer to this plea, the court overruled it with great resentment, and awarded a *respondeas ouster*.

Raym. 34; Keb. 137, Barrington v. Venables.

|| It seems doubtful whether a gentleman of the privy chamber is privileged from arrest, and where the question is doubtful, the court will not discharge the party on motion, but leave him to his writ of privilege.

Luntley v. Battine, 2 Barn. & A. 234; and vide 10 East, 578.

The king's servants are privileged from arrest; and this although they

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publicly carry on trade, and the debt be contracted in the course of such trade.

5 Term R. 686; 2 Taunt. 167.

One of the wardens of the Tower was arrested, and was informed at the time that the plaintiff would be satisfied if he would enter an appearance. He however claimed his privilege, but afterwards executed a bail-bond. The court refused to order the bail-bond to be delivered up to be cancelled, leaving him to plead his privilege.

Bidgood v. Davies, 6 Barn. & C. 84.

The candle and fire lighter to the yeomen of the guard at St. James's palace is privileged from arrest on mesne process.

Hatton v. Hopkins, 6 Maul. & S. 271.¶

It was agreed in Serjeant Scrogg's case,^(a) that the privilege of the court of C. B. which serjeants claimed, extended only to inferior courts, not to the courts in Westminster-hall; and that a serjeant may be sued in any of these, because he is not confined to that court alone, but may practise in any other court: but it is otherwise as to attorneys or filazers, who cannot practise in their own name in any other court but such as they respectively belong to. A serjeant at law therefore is to be sued by original, and not by bill of privilege.

(a) 2 Lev. 129; 3 Keb. 424; 2 Mod. 296, S. C.—So of the servant of a serjeant at law. Cro. Car. 84.

So, in an action by bill brought in C. B. against a serjeant at law, for work done, he pleaded that he ought to have been sued by original, and not by bill. [Upon arguing the demurrer, a case was quoted, Baker against Swindale, in the Court of C. P. Mich. 10 G. Roll. 360. It was an action brought against a prothonotary's clerk by original, to which he pleaded, that he ought to be sued by bill; whereupon the plaintiff demurred, and the court gave judgment that the defendant should answer over. *Per cur.*—This case is in point; serjeants, prothonotaries' clerks, and all others not obliged to attendance in court, are upon the same foot. Judgment *quod billa cassetur*.

Trin. 7 G. 2, Serjeant Girdler's case; Barnes, 371.

The defendant pleaded in abatement, that he was one of the clerks of Sir J. Cooke, prothonotary in C. B. Upon a rule to show cause why it should not be set aside, the affidavit annexed to the plea was produced, wherein the defendant swore, that he served his clerkship with a Common Pleas attorney, and that he had for many years acted as an attorney or solicitor; and followed no other employment. After consideration the court set aside the plea, being all of opinion, that such clerks had no privilege at all, they not being sworn as attorneys are, nor ever acting as clerks in the prothonotary's office: and that it was not sufficient for the prothonotary to enter their names in his book. As to such clerks as were actually employed under him, for so long as they continued in that employment, they would be privileged, but no longer; as in the case of a judge's clerk: and an old rule, 8 Car., was cited, where they were restrained from practising as attorneys.

Payne v. Fry, 1 Stra. 546. The old way of pleading that a man is a clerk of one of the prothonotaries, was, that he was employed in engrossing records, *assidens in curiâ*, and the like. Rast. 473 b, 34 H. 6, 15. And in the Court of K. B. of late years an affidavit has been required to that effect. Cooke v. Latimer; Reade v. Chambers, Fortesc. 342; and in the case of one Worthington, 1 Ld. Raym. 399; Clift. 572.]

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J S being arrested by a writ out of C. B. brought his writ of privilege as clerk of the crown-office; but it appearing that he was only a clerk to Mr. Ward, (clerk of that office,) and not an immediate clerk of the office, a *supersedeas* to the writ of privilege was granted on motion; the court having agreed, that he had no more privilege than an attorney's clerk. (a)

2 Show. 287, pl. 284, Ward v. Lawrence. (a) That an attorney's clerk has no privilege, Comb. 12, adjudged.—But the clerk to the clerk of the Pells in the Exchequer is entitled to the privileges of that court. Comb. 482.

A serjeant at law, (b) barrister, attorney, or (c) other privileged person, whose attendance is necessary in Westminster-hall, may lay his action in Middlesex, (d) though the cause of action accrued in another county; and the court on the usual affidavit will not change the *venue*.

Stil. 460; Mod. 64; 2 Show. 242, pl. 239. (b) Though he hath discontinued his practice for some time. 2 Show. 176, pl. 172. [Vide *supr. contr.* But he does not lose his privilege by residing in the country. 2 Black. R. 1065.] (c) This privilege extends to judge's clerks, and also to the clerk of assize. Salk. 670, pl. 9, 671; 2 Ld. Raym. 1253. (d) It is the common right of any gentleman at the bar to have a trial at bar; and it has never been denied in the case of an officer of the court. 6 Mod. 123, *per cur.*

β The privilege of officers of inferior courts from arrest by process, from the Supreme Court, does not extend beyond the time of their necessary attendance in those courts.

Gibbs v. Loomis, 10 Johns. 463.g

But it hath been held, that if a privileged person be sued, and the action brought against him in the right county, his privilege will not entitle him to have it tried in Middlesex.

Carth. 126; Ld. Raym. 338; Show. 148, Bisse v. Harcourt.—But in Salk. 668, in Wilcock's case, Trin. 2 Ann., the *venue* is said to have been changed where an attorney was defendant. [And the like was done in the case of Wigley v. Morgan, 2 Stra. 1049; Ca. temp. Hardw. 285; Andr. 384. However, this case has been since overruled, and the law is now settled agreeably to the doctrine in the text. Pope v. Redfearne, 4 Burr. 2027; Yeardeley v. Rowe, 3 Term R. 573.]

If an attorney lays his action in London, the court will change the *venue* on the usual affidavit; for by not laying it in Middlesex, he seems regardless of his privilege, and is to be considered as a person at large.

2 Vent. 77; 2 Salk. 668, pl. 1. [So, an attorney suing by original, waives his privilege. Hetherington v. Lowth, 2 Stra. 837; 1 Bos. & Pul. 629, Tagg v. Madan.]

On a motion to discharge a rule which had been obtained for changing the *venue*, it appeared, that the plaintiff was a barrister and master in chancery; and the court held, that he had a privilege, by reason of his attendance, to lay his action in Middlesex, and therefore discharged the rule.

2 Ld. Raym. 1556; Fitzg. 40, S. C., Burroughs v. Willis; 2 Stra. 822; Barnard. K. B. 14.

|| An attorney (not being one of the four attorneys of the Court of Exchequer) is not in that court entitled to the privilege of laying his *venue* in Middlesex.

1 Price, 384, n.

If the plaintiff, an attorney, by mistake lay his *venue* in another county instead of Middlesex, the Court of C. B. will not amend in order to change it.

7 Taunt. 146; S. C. 2 Marsh. 426; and vide 2 Marsh. 152.||

2. Of the Privilege and Protection allowed those whose Attendance is necessarily required

The law not only allows privileges to the officers of the court, but also protects all those whose attendance is necessary in courts; so that if a

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suitor is arrested either in the face of the court, or out of the court, as he is coming to attend and follow his suit, or upon his return, it appears upon complaint made thereof, that the fact was so, the court will not only discharge the party from the arrest, but will punish the officers or bailiffs, as also the plaintiff (*a*) who procured the arrest, as for a contempt to the court.

Brownl. 15; Raym. 101; 2 Mod. 181; 2 Roll. Abr. 272; Golds. 33. (*a*) If he knew that the party was prosecuting or defending any suit; because an affront to the court, as well as an injury to the party arrested. 2 Lil. Reg. 369.

β The protection given to suitors and witnesses is extended to every case where the attendance is a duty in conducting any proceeding of a judicial nature.

United States v. Edme, 9 S. & Rawle, 151; but see Brookes v. Chesley, 4 Har. & M'Hen. 295; see also, Hurst's case, 1 Wash. C. C. R. 136; Miles v. M'Culloch, 1 Binney, 77; Blight v. Fisher, 1 Peters, C. C. R. 41; Smyth v. Banks, 4 Dall. 329; Humphreys v. Cumming, 5 Wend. 90; Clark v. Grant, 2 Wend. 257; Livingston's case, 8 Johns. 351; Norris v. Beach, 2 Johns. 294; Grover v. Green, 1 Cain. 115; McNeill's case, 3 Mass. 288; *Ex parte* McNeill, 6 Mass. 245; *Ex parte* Hall, 1 Tyler, 274; Halsey v. Stewart, 1 South. 366; Harris v. Grantham, 1 Cox, 142; Commonwealth v. Renald, 4 Call. 97; Richards v. Goodsen, 2 Virg. Cas. 381; Bours v. Tuckerman, 7 Johns. 358; Huntingdon v. Shultz, Harper, 452; Rishton v. Nisbitt, 1 M. & Rob. 347; Spencer v. Newton, 5 Ad. & Ell. 818.

A judge is not liable to arrest by process issued out of his own court, but must be proceeded against by bill.

Case of W. Livingston, 8 Johns. 351.

But may be by process from another court.

Gratz v. Wilson, 1 Halst. 419.

The husband of a party attending is privileged from arrest.

1 Mont. D. & De G. 278.*g*

Serjeant Scroggs, entering his coach at the door of Westminster-hall, was arrested upon *latitat* out of B. R., and complaint being made thereof in C. B., it was agreed, that not only serjeants at law, but all other persons whatsoever, are freed from arrests so long as they are in view of any of the courts at Westminster, or if near the courts, though out of the view, lest any disturbance may be occasioned to the courts or violence used, which in such cases is very penal. In this case the serjeant was discharged of the arrest by rule of court, and the judges said, that if the plaintiff should bring an action against the sheriff for an escape, they would commit him. The bailiffs who made the arrest were committed to the Fleet, but the next day upon their submission and acknowledgment, were discharged, paying their fees.

Mich. 26, Car. 2 in C. B.

β The sheriff is not bound to take notice of the privilege of the defendant, (*b*) but if he does do so, and permits him to go at large after he has been taken, the defendant's privilege is a good defence to an action against the officer for an escape.

Ray v. Hogeboom, 11 Johns. 433. (*b*) Sperry v. Willard, 1 Wend. 32; 8 Pick. 137; 18 Johns. 52. But see as to the liability of the sheriff, 1 Wend. 33; Secor v. Bell, 18 Johns. 52.

The service of process, either summons or capias, in the actual or constructive presence of the court, is a contempt of court.

Blight v. Fisher, 1 Peters, C. C. R. 41.*g*

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So, where one Long, an attorney of C. B., was arrested in Palace-yard, not far from the Hall gate, sitting the court, he together with the officer was brought into court, and the officer committed to the Fleet; and because the plaintiff was an attorney of B. R. who informed the Court of C. B. that his cause of action was 200*l.*, the court ordered that another of the sheriff's bailiffs should take charge of the prisoner, and that the prothonotary should go with him to the Court of B. R., and that court, being informed how the case was, discharged the defendant on common bail. The writ upon which he was arrested was an attachment of privilege, which the court supposed to be designed to oust him of his privilege; for there was another writ against him at the sheriff's office, at the suit of another person.

2 Mod. 181, Long's case.

If process hath issued against a husband, and in coming to defend it he and his wife are both arrested, the wife shall have privilege as well as the husband; for they are considered as one person in law, and the wife cannot answer without her husband.

Dyer, 377 a, pl. 30; Bro. *Priv.* 17; et vide Noy, 68.

If the court give either plaintiff or defendant leave to inquire after evidence in any cause depending in that court, and he be arrested, he shall have privilege; but it is otherwise if he go without the permission of the court. So, if one on the day he has been attending his cause be arrested at ten o'clock at night, by one no way engaged in the cause, he shall not have privilege. (a)

2 Roll. Abr. 272. [(a) But *quære* of this, for the returning has never been very nicely scanned, so as to require a man to go the direct road. Bro. *Privilege*, 4, allows that the protection is not forfeited by the plea of *extra viam*, because it may be the party went to buy a horse, victuals, or other necessities for his journey. Neither is the law so strict in point of time as to require the party to set out immediately after the trial is over, as in the case of Hatch v. Blissett, *infra*, and Gilb. R. 308. The defendant, an old woman, had a trial at Winchester assizes, which was over on Friday, at four in the afternoon: she stayed there till after dinner on Saturday, and in the evening at seven was arrested going home to Portsmouth, which is twenty miles; and the court held, that she ought to be discharged, that her protection was not expired, and a little deviation or loitering would not alter it. And in a later case, where the defendant was attending his cause at the sittings, and though it was put off early in the day, stayed in court till five in the afternoon, and then went with his attorney and witnesses to dine at a tavern, where he was arrested during dinner; the court held, that such a necessary refreshment as this ought not to be looked upon as a deviation, so as to cancel the defendant's privilege *redeundo*. Lightfoot v. Cameron, 2 Black. R. 1113.] {See 9 Ves. J. 69, Sidgier v. Birch; 4 Dall. 329, Smythe v. Banks; Ibid. 387, Hurst's case.} || But where a party in London was required to attend an arbitration at Exeter on a given day, and three days before set off, accompanied by his attorney, and went to Clifton, where his wife resided, and where were some papers necessary to be produced, and was occupied for a great part of two days in sorting and arranging them; and on the afternoon of the second day was arrested: held, that he had forfeited his privilege by the delay: Abbott, C. J., *diss.* Randall v. Gurney, 3 Barn. & A. 252. But the majority of the Court of Exchequer held the party privileged under these circumstances. 7 Price, 699. ¶ See *Ex parte* Hunt, 1 Wash. C. C. R. 186; Smythe v. Banks, 4 Dall. 329; *Ex parte* Mifflin, 1 Penn. Law J. 146; Anthon's N. S. P. 189; Miles v. McCullough, 1 Bin. 77; Gibbs v. Loomis, 10 Johns. 463; Blight v. Justice, 1 Pet. C. C. R. 41; Norris v. Beach, 2 Johns. 294; Wetherill v. Seitzinger, 1 Miles, 237; Rex v. Blake, 2 Nev. & M. 312; Love v. Humphrey, 9 Wend. 204; Pitt v. Coombes, 3 Nev. & M. 212; Clark v. Grant, 2 Wend. 257; 5 B. & Adolph. 1078; Sandford v. Chase, 3 Cow. 381; Strong v. Dickinson, 1 Mees. & Wels. 488; Spencer v. Newton, 5 Ad. & Ell. 818; Harris v. Grantham, Cox, 142; Commonwealth v. Ronald, 4 Call. 97; Richards v. Goodson, 2 Virg. Cas. 381; Halsey v. Stewart, 1 South. 366. *g* A witness is not privileged from being arrested by his bail: the bail may take him, after he has finished

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his evidence, for the purpose of surrendering him. *Ex parte* Lyne, 1 Ry. & Moo. Ca. 132.||

A has a suit against B in C. B., and afterwards B is arrested in an inferior court, when he was not coming to or returning from the defence of his suit; he shall not have privilege.

Jenk. 173.

A person coming to give security of the peace, it was held he was privileged; if he had come to have sworn the peace, the arrest would have been allowed.

Comb. 29, *The King v. Fielding.*

So, where one came to confess an indictment, the court held he had no privilege *eundo et redeundo*, because there was no process against him.

2 Salk. 544, pl. 6; *sed vide infra.*

The courts not only protect the parties themselves, but all witnesses are protected *eundo et redeundo*; for since they are obliged to appear by the process of the court, they will not suffer any one to be molested whilst he is paying obedience to their writ.

Vent. 11; Mod. 66. *β* See *Ex parte* Edme, 9 S. & R. 147; Hall's case, 1 Tyler, 74; Smythe v. Banks, 4 Dall. 329; Blight v. Ashley, 1 Pet. C. C. R. 41; Norris v. Beach, 2 Johns. 294; Taft v. Hoppan, Anth. N. S. P. 187; *Ex parte* King, 7 Ves. J. 312.*g*

[And it hath lately been laid down by the court of C. P. as a general rule, that all persons who have relation to a suit which calls for their attendance, whether they are compelled to attend by process or not, are entitled to privilege from arrest *eundo et redeundo*, provided they come *bonâ fide*. And in this description bail and barristers upon the circuit are included.

Meekins v. Smith, 1 H. Bl. 636;] *β* United States v. Edme. 9 Serg. & R. 151.*g*

{A party attending an arbitrator to be examined under an order of the court is privileged from an arrest.

8 Term, 536, Hetley's case, cited by Lawrence, J.; 3 Ves. J. 350, Moore v. Booth; 2 East, 89, Spence v. Stuart.}

Also, the courts not only protect the persons of their attendants, but likewise all those things that are necessary for their journey or the defence of their suit; but not merchandises or goods for sale or traffic.

20 H. 6, 4; Bro. *Priv.* 55; 2 Roll. Abr. 273.

[The court of B. R. hath refused to discharge a person in custody by process of the sheriff's court in a cause afterwards removed into B. R., because he was arrested whilst attending commissioners of bankrupt to prove a debt.

Kinder v. Williams, 4 Term R. 377. But see *Ex parte* Kerney, 1 Atk. 55; *Ex parte* Dick, and *Ex parte* Stow, 2 Black. R. 1142.] {And 8 Term, 534, Arding v. Flower; 7 Ves. J. 312, *Ex parte* King.}

{The privilege extends to arrests on judicial {¹} as well as on mesne process; and to the service of a summons {²} as well as to an arrest.

{¹} 4 Dall. 387, Hurst's case; and see 3 Dall. 478, Cox v. M'Clenachan, *contra*. 1 Dall. 356, Starret's case. {²} 1 Bin. 77, Miles v. M'Cullough.

A witness in one court arrested on process issuing from another court, may be discharged by order of the former.

4 Dall. 387, Hurst's case; 2 Johns. Rep. 294, Norris v. Beach.

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If the first arrest is illegal, all detainers afterwards lodged under it are so too.

4 Ves. J. 691, *Ex parte* Hawkins; 5 Ves. J. 2, Bromley v. Holland; 8 Ves. J. 598, *Ex parte* Ledwich; 9 Ves. J. 69, Sidgier v. Birch. See 10 Ves. J. 328, *Ex parte* Dumbell.}

|| A plaintiff, in expectation of his cause coming on, is privileged from arrest while waiting in the vicinity of the court before the day of trial.

Childerstone v. Barrett, 11 East, 439; β Hurst's case, 1 Wash. C. C. R. 186; *Ex parte* Mifflin, 1 Penn. Law J. 146.*g*

So also is a person attending the Insolvent Debtors' Court to oppose the discharge of a debtor.

Willingham v. Matthews, 6 Taunt. 356.

So also bail attending to justify.

Rimmer v. Green, 1 Maule & S. 638.

So also a defendant in a cause attending an arbitrator to be examined under a rule of court.

Spence v. Stewart, 3 East, 89. *Sed vide* 3 Barn. & A. 252; 7 Price, 699; β Clark v. Grant, 2 Wend. 237; *Ex parte* Edme, 9 Serg. & R. 147; Sandford v. Chase, 3 Cowen, 381; Norris v. Beach, 2 Johns. 294.*g*

So also a bankrupt attending a meeting of commissioners to declare a dividend, although several years after his last examination.

Arding v. Flower, 8 Term R. 534.

But a capital burgess of a borough attending an election of co-burgesses under a summons from the mayor, issued in obedience to a *mandamus* directing the corporation to proceed to such election, is not privileged during his attendance.

Nixon v. Burt, 1 Moo. 413; S. C. 7 Taunt. 682.

If a plaintiff is arrested while attending the execution of a writ of inquiry at his own suit, the under-sheriff cannot discharge him, but the court will do so on motion.

Walters v. Rees, 4 Moo. 34.||

3. In what Cases this Privilege is to be allowed.

The privilege allowed officers of the court is to be understood as extending only to such cases where the party who sues them has sufficient remedy in their own courts: therefore, if a writ of entry or other real action be brought against an attorney of B. R., he cannot plead his privilege; because, if this should be allowed, the plaintiff would have a right without remedy: for the King's Bench hath not cognisance of real actions.

Sand. 67.

So, if an attorney of C. B. be sued in an appeal, he shall not have his privilege; for his own court hath not cognisance of this action.

Sand. 67.

So, if money be attached in an attorney's hands by foreign attachment in the sheriff's court in London, he shall not have his privilege; because in this case the plaintiff would be remediless; for the foreign attachment is by the particular custom of London, and does not lie at common law.

Sid. 362; Sand. 67; 2 Keb. 346, Turbill's case; and vide 2 Leon. 156; {8 Term, 417, Ridge v. Harcastle.}

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§ Money collected by an attorney for his client and not paid over, is not the subject of a foreign attachment.

Riley v. Hurst, 3 Penn. Law, J. 268.

So moneys collected by a justice of the peace on judgments rendered by him.

Corbyn v. Bollman, 4 Watts & S. 342; and see Conant v. Bicknell, 1 Chip. 50; Dubois v. Dubois, 6 Cowen, 494.*g*

In indictments, informations, or suits, in which the king alone is concerned, the officer shall not have privilege; for it would be unreasonable that the court should allow protection to those who offend against the public peace of the community and the king's interest.

3 Leon. 81; 2 Rol. Abr. 274; Lit. R. 97.

But it seems the better opinion, that in an action *qui tam*, as on the stat. 23 H. 6, c. 7, against an attorney, for continuing sheriff longer than a year, the defendant ought to have his privilege; for though it be brought in the king's name, and the king is to have part of the money, yet it is to be considered as the mere suit of the party, in which the party may be nonsuit. Besides, the party may have a *tales*, without the warrant of the attorney-general.

3 Lev. 398; Comb. 319; Lutw. 193; Skin. 549, pl. 10; Salk. 30; Ld. Raym. 27; 2 Salk. 543, pl. 1; 1 Black. R. 373; Cowp. 367.

Also, the privilege the courts allow their officers is restrained in those suits only which they bring in their own right, or are brought against them in their own right; for if they sue or are sued as executors or administrators, they then represent common persons, and are not entitled to privilege.

Hob. 177; Dyer, 24, pl. 150; 2 Sid. 157; Latch. 199; Godb. 10; Brown and Goldsb. 47; Sav. 20.

|| But an attorney who is justice of the peace for a borough is entitled to be sued by bill for an act done in his office of magistrate; and, if sued by original, he may plead his privilege in abatement.

3 Taunt. 166.||

Where a clerk of the king's remembrancer in the Exchequer married a woman who was executrix to J S, and having brought an action of debt by privilege, for a debt due to the testator, it was held, that he was not entitled to privilege.

So in an action against an attorney, who was executor to J S, who pleaded his privilege, it was overruled, though it was urged, that there was a difference where the attorney was plaintiff and where defendant; but the court held it the same in both cases.

Salk. 2, pl. 4; Ld. Raym. 533, Newton v. Rowland.

Also, if a privileged person brings a joint action, this destroys his privilege; because those with whom he joins are not officers of the court nor entitled to the attachment which the court grants to its own officers.

2 Rol. Abr. 274.

So, if an action be brought against a privileged person and others, he shall be ousted of his privilege; for if otherwise, he would destroy the plaintiff's action, as he would be obliged to sue the others by original writ, and him by petition. But some opinions are, that this must be understood where the action is joint in its nature, and cannot be severed;

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and that if the action can be severed without doing any injury to the plaintiff, the officer shall have his privilege.

14 H. 4, 21; 20 H. 6, 32; Dyer, 377; 2 Rol. Abr. 274, 275; Godb. 10; Noy, 68, 2 Sid. 157; Vent. 298; 2 Lev. 129; 2 Mod. 296; Vern. 246.

But this matter came fully to be considered in a late case, where trespass was brought in B. R. against an attorney and another person: the attorney pleaded his privilege as an attorney of C. B., and concluded *quod non intendit quod cur. cognoscere velit*, &c.; and on demurrer, though it was admitted that the nature of the action was several, yet the court, on consideration of the above cited cases, held, that the rule was general, and that the plaintiff was not bound to bring separate actions; and thereupon awarded a *respondeas ouster*.

Hil. 8 G. 2, in B. R., Pratt v. Salt.

β If a freeholder (who is privileged from arrest) unite in a joint bond or commit a joint trespass with one who is not a freeholder, he may be arrested on a joint *capias* against both.

Fife v. Keating, 2 Browne, 135.

An attorney or other officer of the court is never privileged from arrest when sued with another.

Gay v. Rogers et al., 3 Cowen, 368; Tiffany v. Driggs, 13 Johns. 252; Chenango Bank v. Root, 4 Cowen, 126; but see Rup v. Biggs, 2 Dowl. P. C. 179; Pitt v. Pockock, 2 C. & M. 146.*g*

|| And an attorney sued jointly with his wife, for her debt incurred *dum solo*, loses his privilege.

Robarts v. Mason et ux., 1 Taunt. 245.

But an attorney sued by bill, jointly with a person having privilege of parliament, is entitled to his privilege.

Ramsbottom v. Harcourt and another, 4 Maule & S. 585.

The privilege only belongs to an attorney who *practises*, and has a certificate according to 25 Geo. 3, c. 80; and unless an attorney has practised within a year, he is not entitled to it.

Brooke v. Bryant, 7 Term R. 25; Dyson v. Birch, 1 Bos. & P. 4; β Brooks v. Paterson, 2 Johns. Ca. 102, Coleman's case, 133.*g*

But he will not lose his privilege by neglecting to renew his certificate on the expiration of the former one, provided he renews it within a year.

Skirrow v. Tagg, 5 Maule & S. 281; and vide 2 Maule & S. 605.

An attorney in custody for debt loses his privilege and may be detained upon mesne process.

Byles v. Wilton, 4 Barn. & A. 88.

But he is not precluded from suing by attachment of privilege for a debt due to *himself*, although the statute 12 Geo. 2, c. 13, § 9, prohibits his commencing a suit for another during his custody.

Kaye v. Denew, 7 Term R. 671.||

4. *Of claiming and allowing Privilege; and therein, that it must be set forth and pleaded.*

Privilege is to be claimed and allowed of in courts in such (a) manner as the law directs, and in most cases it is a matter to be taken strictly. (b)

Dalst. 16; Vaugh. 154; 2 Buls. 36. (a) Not to be allowed on motion. Still. 373, vide 2 Chan. Ca. 69.—An attorney must plead his privilege, and cannot be discharged on motion. Salk. 554, pl. 3. [1 Wils. 306; 2 Stra. 864; 2 Ld. Raym. 1567; Bar-

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nard, B. R. 300. But where an attorney is arrested by *latitat* in his own court, it is a motion of course to discharge him on filing common bail. Wheeler's case, 1 Wils. 298; Imp. K. B. 474, ed. 1791. In the case of Crossley v. Shawe, 2 Black. R. 1085, the Court of C. P. held, that an attorney arrested by *capias* upon a special original out of that court was not entitled to his discharge upon serving the sheriff with a writ of privilege, but must plead his privilege. If, indeed, the arrest were upon process out of an inferior court, his writ ought to be allowed *instante*. Rawlins v. Parry, Sir George Cooke's notes, p. 2.] (b) 2 Sid. 164.

§ A witness attending in a cause pending in the Supreme Court of the state, was arrested by process issued out of the United States court, at the suit of the United States: held, that the state court had authority to discharge him.

United States v. Edme, 9 Serg. & R. 147.

But where the Court of Common Pleas had decided that one of its suitors was not entitled to privilege, the Supreme Court refused to interfere in *habeas corpus*.

Commonwealth v. Hambright, 4 Serg. & R. 149; Livingston's case, 8 Johns. 351.

The practice is to refer the party to the court in which the contempt is alleged to have been committed.

Kinsman v. Reinex, 2 Miles, 200.

The privilege may be waived by submission to the arrest.

Brown v. Getchell, 11 Mass. 11; Fletcher v. Baxter, 2 Aik. 224; Bidgood v. Davis, 6 Barn. & C. 84; S. C. 9 D. & R. 153.

But mere silence of the defendant at the time of arrest is not a waiver of privilege.

Swift v. Chamberlain, 3 Conn. 537.*g*

If an inferior court will proceed after a writ of privilege is delivered, it is a nullity, and the courts at Westminster will discharge the party.

8 Co. 141; 2 Brownl. 101.—A writ of privilege disallowed by an inferior court, held error. Cro. Eliz. 152.

One Fletcher was sued in the Marshal's Court, and he procured a writ of privilege as attorney of C. B., upon which the plaintiff in the Marshal's Court surmised, that he was forejudged before, and produced the record of his forejudger; upon which the Marshal's Court proceeded; and upon complaint thereof in C. B. the court held, that the writ of privilege ought not to have been questioned there, but ought to have been allowed; and that if it was not duly obtained, it was a matter examinable here; therefore all the proceedings in the Marshal's Court were set aside, and the plaintiff ordered to pay all costs of the proceedings since the writ of privilege, otherwise an attachment to issue.

Hil. 26 Car. 2, Barns v. Fletcher.

A clerk to one of the Barons of the Exchequer being sued in B. R. pleaded, that *tempore quo memoria non extat* all the clerks of the king's court of Exchequer were privileged from being sued elsewhere than in that court; and that the defendant was clerk to R. P, *un' Baron' de Scaccario nostro prædict'*; upon demurrer, the court said, there were two ways of pleading privilege; one was to go to issue, and at the trial, if the party be an officer of record, to show it by producing the record; if he be not an officer of record, but is attendant on one of the Barons, that must be tried by a jury; because the Court of Exchequer, as a court, cannot take notice of it any more than the Court of King's Bench; the other way is, if he be an officer on record, to produce a writ of privilege at the time of the plea pleaded, and then no issue can be joined upon it;

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and here the custom is ill pleaded, for *tempore quo non extat memoria* is nonsense, it should be *cujus cont' memoria*, &c.; and because that he did not aver to one of the Barons of the king's Exchequer, but *de Scaccario nostro*, a *respondeas ouster* was awarded.

6 Mod. 305, Phips v. Jackson.

In an action against A he pleaded his privilege thus: And the said A in his proper person says, that he is, and at the time of exhibiting the bill was, one of the clerks of T W, one of the prothonotaries of the Court of C. B. at Westm. in the county of Middlesex, and attending his office every day, and concluded with an averment generally, without annexing any writ of privilege to his plea; and this on demurrer was held ill, because the defendant did not say *venit* as well as *dicit*; and for that he did not lay any *venue*, so as the fact of his being a prothonotary's clerk might be tried; for it is a matter issuable, for their clerks are not enrolled. (a)

Carth. 362; Skin. 582, pl. 2, Stevens v. Squire. (a) Hard. 164; 7 Mod. 97. But the privilege of an attorney or officer on record is not traversable, nor triable *per pais*. Salk. 30; 2 Salk. 543, pl. 1; Ld. Raym. 27; 2 Sid. 164; 2 Lutw. 1466; Vent. 264; 3 Keb. 352; Skid. 582, pl. 2; [2 Black. R. 1088.]

β The exemption from arrest is not a matter which can be pleaded and put in issue to a jury, but is ground for a motion to the discretion of the court.

Fletcher v. Baxter, 2 Aik. 224; Prentiss v. The Commonwealth, 5 Rand. 697; Harris v. Grantham, Coxe, 142.

In Connecticut a party entitled to privilege may avail himself of it by plea in abatement.

King v. Coit, 4 Day, 129.g

To an action brought in B. R., the defendant pleaded his privilege of an attorney of C. B., without producing any writ of privilege, and without saying *prout patet per recordum*; and two exceptions were taken: 1st, The want of averment, *prout*, &c.; 2dly, That there was no place laid where the defendant was an attorney. And *per* Holt, C. J., there are two ways of pleading this matter so as it cannot be denied, viz., with a *profert* of a writ of privilege; or of an exemplification of the record of his admission; or it may be pleaded as it is here: and as to the averment by the record, it is never pleaded as a matter of record, which is always pleaded with time, viz., of such term, &c.; but never any plea was seen that the defendant of such term was admitted attorney, &c. As to the second exception he said, that it was not necessary to lay a *venue*; for that this being a matter concerning the person of the defendant, it should be tried where the writ was brought.

2 Salk. 545, pl. 8; 2 Ld. Raym. 1172, Scawen v. Garret.

An attorney of C. B. being sued in B. R., pleaded his privilege; to which it was demurred specially, for not concluding his plea with a *profert* of a writ of privilege testifying his being an attorney, &c. And *per* Holt, C. J., the difference is, if privilege of an attorney be pleaded with a writ, the defendant cannot be denied to be an attorney; if without he may; and then a *certiorari* shall be awarded to certify whether he be or not.

2 Salk. 545, pl. 7; Dillon v. Harper, 2 Ld. Raym. 898, S. C. Vide 7 Mod. 106, Clifton v. Swezeland, like case.

|| An attorney of K. B., in pleading his privilege against being sued by original, improperly stated the custom of that court to be not to compel its attorneys to answer an original writ unless first *prejudged from their office*, (which is the custom in C. P. but not in K. B.;) the court, however, held that enough appeared to sustain the plea of privilege, and that they would

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take notice that an attorney could only be sued by bill, and reject the statement of the custom as surplusage.

Stokes v. Mason, 9 East, 424.

And where the plea of an attorney stated his privilege not to be compelled to answer any bill to be exhibited against him *in the custody of the marshal*, and concluded (like a plea to the jurisdiction) that the court could not *take further cognisance*, &c., (instead of praying judgment of the bill, and that it might be quashed,) the court refused to consider it as a plea to the jurisdiction, in which case it would have been bad, but only as objecting to the court's taking cognisance of an action against one of its attorneys *in that form*; and the court adjudged the bill to be quashed.

Chatland v. Thornley, 12 East, 544.||

An attorney of C. B. pleaded to the jurisdiction of the Court of B. R. And *per curiam*, he shall not be sworn to his plea, (a) nor need the writ of privilege be set forth at large; and if matter of fact be pleaded in abatement, and found against the defendant, judgment (b) final shall be given.

6 Mod. 114. (a) An attorney of C. B. pleaded his privilege in B. R. and annexed a writ of privilege to his plea, tested after the action brought, but made no affidavit of the truth of his plea; and on a motion of Mr. Parker, the plea was set aside for want of the oath; and because it did not appear by the writ that the defendant was an attorney at the time of bringing the action. Mich. 6 G. 2, Wicks v. Dagley; 2 Barnard. K. B. 216, S. C. [Whether it is necessary to annex an affidavit to the plea seems to be a matter of some doubt. See 2 Black. R. 1088. It must appear by the plea, that the defendant was an attorney at the time of bringing the action. A mere clerical mistake in the statement of this fact was holden to be fatal. 2 Str. 864.] The defendant pleaded his privilege that he was an acting clerk to Sir George Cooke, and annexed an affidavit to his plea, that he solicited causes in the court of C. B., but because he did not swear that he entered causes in that office, or that he did business as an entering clerk, the plea was set aside. Hil. 2 G. 2, in B. R. Edmund and Thomas, Barnard. K. B., 141, S. C., may be pleaded without a venue. 2 Ld. Raym. 1173. (b) That it is peremptory. Bro. *Perempt.* pl. 48.

In *assumpsit* by A against B for 1000 yards of black cloth, for which the defendant promised to pay, &c.; the defendant pleaded his privilege as an auditor of the Exchequer, in these words, that the Barons of the Exchequer, their clerks, or other officers of that court, have not been impleaded elsewhere; to which plea there was a demurrer: 1st, Because it was pleaded in the negative. (c) 2dly, Because it was general, *that the Barons and their clerks*; which doth not show but that one of their clerks might be sued elsewhere. 3dly, That the conclusion was, he hopeth, &c.; and for these reasons the plea was thought ill: it was likewise said, that he ought to have concluded *hoc paratus est verificare* unless the Puisne brings into court the red-book (d) of the Exchequer.

2 Sid. 104; Hard. 164, Forster v. Barrington. (c) Vide 2 Ld. Raym. 869; Lutw. 1466. (d) The privilege of an officer of the Exchequer may be pleaded, or by showing the red-book of the Exchequer allowed. 1 Keb. 256; 2 Keb. 103; 2 Lutw. 46.—An accountant of the king's Exchequer allowed his privilege in B. R. on a Baron's coming into court and showing his book of accounts, and this without any plea or prayer of the party. 2 Bulstr. 36.—Where one entitled to the privilege of the Court of Exchequer is sued in C. B. the court sends a *supersedeas*; but if it be in B. R. no *supersedeas* is sent, for that would be to supersede the king; but the practice is to send up the red-book by the Puisne Baron. 2 Salk. 546, *per* Walter, Ch. Baron. [The practice here stated is gone into desuetude, and the method now used of asserting the privilege is by an order from the Court of Exchequer to remove the action, whether commenced in the King's Bench, Common Pleas, or any other court, into the office of pleas of the Court of Exchequer, and that it shall be there in the same forwardness as in the court out of which the action is removed: but this order does not operate as a *certiorari* to remove the proceedings, but as a personal order on the party

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to stay his proceedings there with liberty to commence his action in the office of pleas, and of course calls upon the defendant in that action to appear, to accept a declaration, and to put the plaintiff in the same state of forwardness in the office of pleas as he was in the other court. So that the order is simply an injunction to stay proceedings in the other court, qualified and softened by a liberty given to sue here; and is to be enforced, as all injunctions are, by attachment. Lord C.B. Eyre's argument in *Cawthorne v. Campbell*, Anstr. 207, 208.] *β* See *Van Alstyne v. Dearborn*, 2 Wend. 586.*g*

In *assumpsit*, the defendant *venit et dicit*, that he is an officer of the Exchequer, and pleads privilege; and on demurrer two exceptions were taken: 1st, Because he pleads his privilege by writ, but not under the seal of the court. 2dly, That it is not said, that the court ought not to have consueance in the beginning of the plea. *Per Holt, C. J.*—If a man pleads privilege, and at the time of pleading he produces a writ testifying that he is an officer, the plaintiff cannot deny the privilege: but, if he pleads it without a writ, the plaintiff may deny it, but the plea is good without showing the writ. As to the second exception he held, that the conclusion made the plea; for if a man begins in bar and concludes in abatement, it is a plea in abatement.

Ld. Raym. 336; Salk. 194, pl. 3, *Thomee v. Lloyd*; Ld. Raym. 336; Comb. 482; 12 Mod. 195; 6 Mod. 88.

The clerks of the papers and secondary of the King's Bench, when they claim privilege, declare themselves to be clerks to the master.

Sid. 74.

Privilege in the Common Pleas must be certified by the prothonotaries, and not by the secondaries.

Sid. 65.

It hath been a matter of great doubt how far an attorney of C. B., or other privileged person, being *in custodiâ marescalli*, shall be ousted of his privilege; for on the one hand, being in actual custody he is to answer to the plaintiff's demand lodged against him, and not to the process that brought him in; and, on the other hand, it hath been thought hard, that his being there by coercion and on a fictitious trespass should oust him of his real privilege; the determinations herein have been, 1st, That though A be *in custodiâ marescalli* at the suit of B, yet when B declares against him he may plead his privilege, because he comes there by coercion, and had no opportunity before to take advantage of it. 2dly, If A files bail at the suit of B, and in the same term a declaration is delivered against A at the suit of C, A may plead his privilege against C as well as against B; for it were absurd that C, who tops his suit upon the action of B, should have more liberty or advantage against A than B himself had. 3dly, But if it be in a subsequent term, or if by any thing A waive his privilege in the first action, he then becomes obnoxious to the suits of every one; and as to C he is truly *in custodiâ marescalli*; for being once ousted of his privilege, he can no longer attend as an officer in the other courts, but is fixed in the King's Bench; and therefore cannot, by the supposition of the necessity of his attendance, oust the party of his action.

2 Bulstr. 207; 2 Roll. Abr. 275; Salk. 1, pl. 3; Ld. Raym. 90; 5 Mod. 310; 3 Lev. 343; Carth. 377; Ld. Raym. 93, 136.

So, if an attorney of C. B. is brought into the Court of B. R. at the suit of an attorney there, which is an estoppel to the defendant's privilege, the defendant shall be ousted of his privilege in all other actions commenced against him in B. R. in the same term; because the jurisdiction of this court was attached upon him by the first action.

Carth. 377.

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β The privilege of a suitor does not hold when he has been surrendered by his bail in another cause, and is in actual custody at the time of arrest.

Davis v. Cummings, 3 Yeates, 387; Wright v. Stanford, 1 Dowl. N. S. 272.

But if the first arrest be unlawful, the defendant cannot be served with otherailable process at the suit of the same plaintiff while in custody upon the illegal arrest.

Pettier v. Washington Bank, 2 Green. 391.*g*

As to the time of pleading privilege, it has been laid down in a variety of cases as a sure rule, that after imparlance the defendant cannot plead his privilege, because by imparlance he affirms the jurisdiction of the court, which by this plea he would oust. But herein these distinctions have been taken, and the law by the modern authorities seems now established, that after a general imparlance the defendant cannot plead privilege, because he must then plead in chief; so after a special imparlance in this manner, *Salvis omnibus allegationibus et exceptionibus omnimodis tam ad breve quam ad narrationem*; for by this special imparlance he has confined himself to take advantage of the defects in the writ and count only; but in case of a general special imparlance obtained from the court, viz., *Salvis sibi omnibus et omnimodis advantagiis et exceptionibus*, he may after plead his privilege; for this is not to oust the court of its jurisdiction, but is a privilege which each court allows to the officers of the other, to be sued in their own court only.

22 H. 6, 7, 2 Roll. Abr. 275, 276; Dyer, 33; Godb. 286; Still. 295; Lev. 54; Keb. 195, 221, 256; 2 Show. 145, pl. 124; Hard. 365; Sid. 318; 2 Keb. 103, 121, 163; Show. 49; Lutw. 46; Salk. 1, pl. 3; Comb. 68.

β A confession of judgment is a waiver of the privilege from arrest.

Geyer v. Irwin, 4 Dallas, 107.

So also is obtaining a rule to show cause of action and procuring a reduction of bail.

Green v. Bonafon, 2 Miles, 219.

But not the mere entry of bail to the officer, if no other act be done to acknowledge the jurisdiction.

Ex parte Edme, 9 S. & R. 147; Swift v. Chamberlain, 3 Conn. 537; Blackiston v. Potts, 2 Miles, 388.

If the court had no original jurisdiction of the parties, or cause of action, the objection may be taken even after plea and issue joined.

Mannhardt v. Soderstrom, 1 Binney, 138.

Whether after bail is put in, the arrest and proceedings may be set aside for irregularity, must depend on the practice of the court, and the Supreme Court will not interfere with the proceedings of an inferior court in this respect.

Livingston's case, 8 Johns. 351.

Where a privileged party who is arrested, pays the money into court by permission of a judge in order to obtain his discharge, he is entitled on application to the court to have the money restored to him.

Pitt v. Coombs, 4 Nev. & M. 535; 2 Ad. & Ellis, 459; 1 Har. & Woll. 13.*g*

A witness was arrested in his return from Winchester assizes, and in the term following was discharged by motion on common bail by the court from which the record issued, and that without having the privilege of the court of *nisi prius* certified. Had the arrest been at the assizes, the

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judges there might have discharged him ; for privileges given by law are to be prosecuted in such a manner as the party may most easily get the benefit of them.

Trin. 13 Ann. in B. R., *Hatch v. Blisset*, Gilb. Cas. 308 ; 2 Stra. 986.

5. *How privileged Persons are to sue and be sued.*

When an attorney or other officer entitled to privilege is plaintiff, he regularly sues by writ of privilege, (a) and is sued by bill ; which processes issue out of the court in which the action is commenced, and have no foundation in Chancery.

4 Inst. 71, 99, 112. (a) In the Exchequer where the plaintiff is privileged, the suit is *quo minus* ; where the defendant is privileged, the suit is by bill. 2 Salk. 546.

β A privilege of being sued by bill and not by writ is merely personal, and may be waived by an agreement not to take advantage of it.

Leal v. Wigram, 12 Johns. 88.

Or by a voluntary submission to the arrest.

Brown v. Getchell, 11 Mass. 11 ; *Fletcher v. Baxter*, 2 Aikens, 224 ; *Prentis v. Commonwealth*, 5 Rand. 697.*g*

But an attorney is not obliged to sue by writ of privilege, but may sue by original ; but if he elects the former, he must name himself attorney, &c. ; for when any particular character or relation gives any person rights and privileges, it must be set forth.

Vent. 199 ; 28 E. 3, 4 ; Cro. Eliz. 731.

And therefore it hath been held, that if an attorney sues by original, he must declare as others do ; and that if he does otherwise, it will be fatal on a special demurrer, though he aided after verdict, and also good on a general demurrer.

2 Lev. 40 ; Vent. 198 ; 2 Keb. 860, 879 ; 3 Keb. 15.

Attorneys are entitled to process of attachment, and are not to be arrested or held to special bail, let the cause of action be what it will ; for being officers of the court they are obliged to a constant attendance, and are presumed to be always amenable.

Mod. 10.

A filazer of B. R. was arrested by writ, but discharged on common bail ; for he ought to be sued by bill, as being present in court.

2 Salk. 544, pl. 4, *Brown's case*.

A bill cannot be filed against a person privileged in vacation ; (b) for then he is not present in court, and as to the vacation, it begins the last day of the term, as soon as the court rises.

Salk. 544. [(b) But now it may be filed in vacation as well as in term time, Dougl. 300 ; ||6 Taunt. 347 ;] though if it be filed in vacation, otherwise than to avoid the statute of limitations, the plaintiff will not be allowed his costs, if the action should be settled before the ensuing term.] ||And where the cause of action arises after term, there should be a special memorandum stating the day of bringing the bill into the office of the clerk of the declarations. 5 Term R. 325 ; *Tidd's Prac.* (7th ed.) 86.||

|| And therefore formerly a bill could not be filed for an escape against the warden of the Fleet in vacation.

Crook v. Eyles, 2 Marsh. 49.

But now by 59 Geo. 3, c. 64, such a bill may be filed in vacation, in the prothonotaries' office of the C. P., or in the office of pleas in the Exchequer.||

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The bill must be filed though the attorney agrees to appear and dispense with it; but it may in such case be filed afterwards.

2 Salk. 544, pl. 5.

In an attachment of privilege by the marshal he shall have no attorney, because present in court.

6 Mod. 16.

An information was exhibited against the *custos brevium* of B. R. for abuses and misdemeanors in his office, who refused to appear in person, (a) but would have appeared by attorney; and the opinion of the court was, that he could not appear by attorney, being an officer of the court, and presumed to be always present; and therefore it was agreed, that no process should be issued against him; but that upon reading the information, if he did not appear, judgment should be given against him.

Sid. 134, *The King v. Paget*. (a) An attorney may plead his privilege by an attorney without any inconvenience, for he may be sick, or have business in another court, and the precedents are both ways. Stil. 413. β So may any defendant. *United States v. Edme*, 9 Sér. & R. 147.g

In an action brought by an attorney by bill of privilege, the judgment was *quod nil capiat per breve*, instead of *nil capiat per billam*; which was held manifest error, unless it could be amended as the mistake of the clerk.

Cro. Car. 580, *Raymond v. Burbidge*.

In a bill of privilege by or against an attorney, no *capias* lies, but an attachment of privilege; and consequently on such proceeding there can be no outlawry.

Leon. 329, *Crew v. Bailie*. Vide tit. *Outlawry*, vol. vii.

In an attachment of privilege by or against an attorney, it hath been held, that pledges to prosecute must be entered on the imparlance roll; and that this is not barely form, but matter of substance.(b)

Dyer, 288 a, pl. 53; Cro. Car. 91, 92; 3 Lev. 39. (b) Seems now aided by the 4 & 5 Ann. c. 16.

The judges, prothonotaries, attorneys, &c., of the Court of C. B. whose attendance is wholly required in court, are not suable by original, but by bill only; but serjeants at law, judges' servants, and other clerks, though they may be entitled to the privilege of being sued in that court, yet must they be sued by original, and not by bill.

2 Mod. 297; 3 Lev. 398; 3 Salk. 283, pl. 8; Ld. Raym. 399.

In *assumpsit* by bill against the defendant as *un' clericorum domini regis coram ipso rege*, the defendant pleaded that he was a filazer, *absque hoc* that he was a clerk; and on demurrer the plea was set aside as frivolous and impertinent, for that filazers are clerks.

Trin. 5 G. 2, in B. R., *Durett v. Hayward*.

6. *Whether there can be Privilege against Privilege.*

It seems a general rule, that there can be no privilege against privilege; so that if an officer of one court sues an officer of another, the defendant shall not plead his privilege; for the attendance of the plaintiff is as necessary in his court as the defendant's is in his; and therefore the cause is legally attached in the court where the plaintiff is an officer.

Bro. *Privilege*, pl. 40; Godb. 81; Jenk. 131; 2 Brownl. 267; Moor, 753; 2 Roll. Abr. 274; Jenk. 173; 2 Keb. 346. [Barnes, 44; 2 Black. R. 1325. If one attorney sue another attorney by attachment of privilege, and hold him to bail, the defendant

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may either plead his privilege in abatement, or move the court to stay the proceedings, but in neither case will he be entitled to costs. *Barber v. Palmer*, 6 Term R. 524.]

|| But though an attorney of the K. B. may sue an attorney of the C. P. in his own court by attachment of privilege, yet he cannot arrest the defendant and hold him to special bail.

Tidd's Prac. (8th ed.) 78; 9 Price, 16, *contra*.

Where an attorney of C. P. is in actual custody of the marshal, he may be sued in K. B. as a prisoner by third persons.

4 Barn. & A. 88; Tidd, 78.||

As where J S, attorney of B. R., brought trespass against the warden of the Fleet who came into the Court of C. B., and prayed the advice of the court, whether he being an officer of the court should be obliged to answer; and on consideration of the equality of privilege the court determined, that he who commences the suit is entitled to privilege; and therefore advises the warden to answer.

2 Leon. 41, Povey's case.

So, where one of the clerks in Chancery was impleaded in C. B. by bill of privilege, by an attorney of the said court, and prayed his privilege; it was denied him; because the plaintiff was privileged in that court as well as the defendant in chancery, and was first interested in his privilege by bringing his writ.

4 Leon. 193, Ben Johnson's case,

So, where the plaintiff brought his bill in the Exchequer to be relieved against a bond, put in suit against the defendant in the Petty-bag Office, which is a court of common law, to which the defendant pleaded his privilege as an officer of the Court of Chancery; the court agreed, that when both parties are privileged persons, his privilege shall take place who first sues; so that here the suit of equity to be relieved against the penalty of the bond, being first attached here, gained a preference in the plaintiff in his suit, which is a distinct suit from that of the defendant at common law; and therefore the plea was overruled, and an injunction awarded till answer. In this case it was said, that if both are privileged, but the attendance of the one is more requisite than that of the other, his privilege shall be allowed who has most cause of privilege.

Hardr. 117, Baker v. Lenthal.

|| A sworn clerk in Chancery may arrest a solicitor on an attachment of privilege in the Petty-bag Office; for such solicitor has no privilege in Chancery, the privilege being in the clerks in court.

Wainwright v. Smith, 2 Russ. R. 568.||

Where an action is brought by the king, the defendant shall not have privilege.

Ld. Raym. 27. β But as to the United States *contra*, see *United States v. Edme*, 9 Serg. & R. 150. γ

An attorney of C. B. sued a member of the University at Oxford, who prayed his privilege, which is, not to be sued in another place; and though it was insisted, that this privilege was given them by act of parliament, yet, in regard the words were general, the court held, that there was no necessity to construe them so as to extend to privileges before *in esse*; and that therefore this special privilege was not taken away by the statute.

Ld. Raym. 342, Joliffe v. Langston.

(C) Privilege of Peers and Members of Parliament: And herein,

1. *Who are the Persons entitled to this Privilege.*

ALL peers, without any distinction as to degree or rank, are entitled to privilege; for they are equally obliged to (a) attend the service of the public, and (b) are always supposed amenable and to have sufficient property to answer in suits and actions brought against them, and on these grounds are to be arrested or molested in their persons. This privilege extended formerly to abbots, as it does to bishops, members of the Convocation, and members of the House of Commons at this day.

4 Inst. 24; Stil. 118, 222, 253, 454; Dyer, 314; Mod. 66; Bro. *Exig.* 3; Moor, 767; Scobell's Memorials, 88, 103; Sir Simon Dew's Journals, 414; Pick. 59; Finch, 355; 2 Ld. Raym. 1247; 3 Seld. Wilk. edit. p. 1478. (a) Dyer, 60 a, *in margine*; Noy, 102; Moor, 778, pl. 1080; Stamf. P. C. 38; Hawk. P. C. c. 22, § 2. That the king's grant or charter of exemption cannot discharge a nobleman from his attendance in parliament. 4 Inst. 49. (b) The law intends them to be assisting the king with their counsel for the commonwealth, and to keep the realm in safety by their prowess and valour. 9 Rep. 49 a; Ibid. 68; Jenk. Cent. 107, pl. 6; Hob. 61; 10 Rep. 76 b; 12 Co. 96.

§ Senators and representatives in Congress "shall in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

Const. U. States, art. 1, sect. 6. See Bouvier's Law Diet. tit. "*Arrest.*" But it seems they may be served with a subpoena. *United States v. Cooper*, 4 Dall. 341. See also *Geyer v. Irwin*, 4 Dall. 107; *Bolten v. Martin*, 1 Dall. 296; *Coxe v. M'Clenachan*, 3 Dall. 478.

A member of Congress is only privileged from arrest while at or actually going to or returning from Congress.

Lewis v. Elmendorf, 2 Johns. Ca. 222.

A member of assembly is not privileged from arrest after he has returned home.

Corey v. Russell, 4 Wend. 204; *Colvin v. Morgan*, 1 Johns. Ca. 415; and see *Prentiss v. Commonwealth*, 5 Rand. 697; *King v. Coit*, 4 Day 133; *Gibbs v. Mitchell*, 2 Bay, 406.

In Massachusetts representatives are not exempted from arrest on final or criminal process, but only on mesne process.

Cooke v. Gibbs, 3 Mass. 197; *Coffin v. Coffin*, 4 Mass. 29.

A member of a state convention is privileged from arrest during the sitting of the convention, and for a reasonable time before and after.

Bolten v. Martin, 1 Dall. 296.g

The privilege of parliament, according to the (c) law of parliament, is of a very extensive nature. But all that is here intended to be treated of is only the taking notice of and pointing out such cases and resolutions relative hereto, as are to be found in the books of law; not to determine concerning this privilege as settled by the rules and orders of each house, of which they themselves are the (d) sole judges, though the king's courts (e) incidentally take notice thereof, and are bound to determine in matters of privilege when so directed by act of parliament.

(c) Ld. Coke says of this law, *ab omnibus querenda est, a multis ignorata, a paucis cognita*, 4 Inst. 15. (d) 13 Co. 63; 4 Inst. 33, 50, 363; *Prinn's Animad.* on 4 Inst. 12; *Cro. Car.* 181, 604; 2 Ld. Raym. 1111. (e) *Vide* Mod. 66. Have determined in relation to their journals. Hob. 111. See the arguments in the case of *Ashby v. White*, *Salk.* 19, pl. 10; 6 Mod. 45; 2 Ld. Raym. 938; *Barnardiston v. Soame*, 2 Lev. 114; 3 Keb. 365, 369; *Onslow's case*, 2 Vent. 37; *The Queen v. Paty*, 2 Ld. Raym. 1105.

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This privilege extends only to the peers of Great Britain; so that a nobleman of any other country, or a lord of Ireland, hath not any other privileges in this kingdom than a common person. Also, the son and heir apparent of a nobleman is not entitled to the privilege of being tried by his peers, which is confined to such person as is a lord of parliament at the time. But it seems, that an infant peer is privileged from arrests, his person being held sacred.

Co. Lit. 156; 2 Inst. 48; 3 Inst. 30, pl. 19.

The peers of Scotland had no privileges in this kingdom (*a*) before the union; but now, by the twenty-third article of the union, the sixteen elected peers shall have all the privileges of the peers of parliament of Great Britain; also, all the rest of the peers of Scotland shall have all the privileges of the peerage of England, excepting only that of sitting and voting in parliament.

(*a*) 9 Co. 117; stat. 5 Ann. c. 8, P. W. 583. [Since this statute, the person of a Scotch peer has been holden to be privileged from arrests. 2 Stra. 999; Fort. 163, 165. But the above article of the statute of union, upon which this privilege is claimed by a peer of Scotland, not one of the sixteen, says, that the peers of Scotland shall have the privileges of the peers of Great Britain, except the right and privilege of sitting in the House of Lords, *and the privileges depending thereon*. Now, as every privilege claimed by a peer solely depends on, and is in consequence of, his sitting in parliament, that is, being an actual lord of parliament, it seems, that the allowing all the Scotch peers the privilege from arrests is not within the words of the act of union, the only act under which the Scotch peers to this day can claim any privilege here at all. 2 Cr. Pr. 127.]

|| And a peer of Ireland had formerly no privileges in Great Britain, till the union of the two kingdoms. But now, by the fourth article of the act of union, the twenty-eight temporal and four spiritual lords of parliament for Ireland in the parliament of the United Kingdom have the same privileges of parliament as the lords of parliament for Great Britain. And the peers of Ireland, as peers of the United Kingdom, are to be sued and tried as peers, and enjoy all privileges of peers, as fully as those of Great Britain; the privilege of sitting in the House of Lords, and those dependent thereon, and that of sitting on the trial of peers, excepted. An Irish peer, however, is not entitled to the privileges of a peer during the time that he is a member of the House of Commons. It has been decided, that an Irish peer is entitled to the letter missive from the Chancellor on a bill being filed against him.

3 Inst. 30, pl. 19; 39 & 40 G. 3, c. 67, art. 4; 8 Ves. 601.

And he cannot be arrested for debt.

Coats v. Lord Hawarden, 7 Barn. & C. 388; 38 S. C. 1 Man. & Ry. 110.*g*

And he ought not to be on a grand or petit jury, unless he is a member of the House of Commons, in which case he is a commoner to all intents and purposes.

Russ. & Ry. Cro. Ca. R. 117.

A peeress by birth (*b*) is entitled to privilege: so of a peeress by marriage, and that as well during the coverture as after: but as a peeress by marriage (*c*) loses her dignity by marrying a commoner, after such marriage she is not entitled to any privilege.

2 Inst. 50; Stil. 222, 234, 252; 2 Chan. Ca. 224; Fortesc. R. 162; Vent. 298; Styl. 222; Eq. Cas. Ab. 349, (A); Co. Litt. 16 b; 6 Rep. 53 b; Dyer, 79, pl. 51; 2 Hawk. P. C. 44, § 11. Order of House of Peers, 21 Feb. 1692. — (*b*) But doubted whether a peeress by patent only for life is entitled to this privilege. Styl. 234, 252. Held,

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that she is not entitled. Styl. 254; but adjourned.—(c) Co. Lit. 16; 6 Co. 53; Dyer, 79.

It was holden by my Lord C. J. Holt, in the case of Lord Banbury, (a) that where a person is called by writ of the House of Peers, he is no peer till he sits in parliament, the writ giving him no nobility or honour; but that it was the sitting in the House of Lords, and associating himself with them, that ennobled his blood; and that, therefore, if the king or he dies before a parliament meets, the writ is determined, and the party remains a commoner; but he held it otherwise in a creation by letters patent, by which the party is immediately noble without any other act or ceremony; and though the parliament never meets, or the king dies, the nobility remains to him and his posterity, according to the limitations in the patent.

(a) Vide this case *infra*.

2. How far this Privilege extends to their Servants and Attendants.

A member of parliament (b) shall have privilege of parliament, not only for his servants, (c) but for his horses, &c., or other goods distrainable.

4 Pryn. Reg. Writs, 624; D'Ewe's Jour. 123; 4 Inst. 24. (b) Noblemen's servants are privileged from arrests in time of parliament. 2 Show. 84, Order of House of Lords, 28 May, 1628. Sir W. Jon. 135. Style, 139, 167; Sir Simon D'Ewe's Journals, 315, 323, 530, 532, 533, 607, 608, 617. (c) Said to extend only to servants, and not to their tenants. Mod. 13. And, in March, 1792, it is said to have been ordered by the Lords in Parliament, 15 Car. 1, that only menial servants, or those who attended on the person of a knight or burgess of parliament, should be free from arrest. || This privilege is taken away by 10 G. 3, c. 50. 5 Term R. 687; 1 Chitt. R. 83. ||

J S brought debt for rent against H, who pleaded that he was tenant and servant to Lord Moon, and prayed his writ of privilege might be allowed; the plaintiff demurred: it was argued, that the matter of the plea was against the common and statute law; but *per Rolle*, C. J.—You ought not to argue generally against the privilege of parliament; every court hath its privilege; I conceive a writ of privilege belongs to a parliament-man, so far as to protect his lands and estate; (d) and you have admitted his privilege by your demurrer.

Stile, 139, *Smith v. Hale*; and vide *Latch*, 150, and the S. C.; Stile, 167, 223. (d) 1 Jon. 155.

The warden of the Fleet insisted upon a writ of privilege, alleging that he was obliged to attend the House of Lords; but it appearing that he was sued upon an escape, and the court considering that great inconvenience would ensue, and being of opinion that it was in their discretion whether they would grant such writ or no upon a motion, they said he might plead it if he would, but they would not award such a writ, or, if his privilege was infringed, he might complain to the House of Lords.

2 Vent. 154.

In debt the defendant pleads he was a servant to a member of parliament, and *ideo capi seu arrestari non debet*; the plaintiff prays judgment; and *quia videtur quod tale habetur privilegium quod magnates, &c., et eorum familiares capi seu arrestari non debent; sed nullum habetur privilegium quod non debent implacitari, ideo respondeat ouster*.

Mod. 146, cited to have been adjudged between *Rivers v. Cousin*, 11il. 24 E. 4, ret. 4, 7, 10, in *Scac*.

Defendant, after a general imparlance, pleaded, that he was a servant to a peer, viz., the Earl of Pembroke; and by North, C. J., it is not re-

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ceivable, for it is the privilege of the master and not the servant's; but the defendant ought to sue his writ of privilege, for perhaps his master will not protect him; and if he will not, he is then left to answer: like to the case of a counsellor, where it is the privilege of the client that he shall not be compelled to discover the secrets of the client; but if the client be willing, the court will compel the counsel to discover what he knows; which Serjeant Maynard said was his father's case before the Lord Cecil in the Court of Wards. North said, as it was a matter of great consequence, he would advise with the Lord Chancellor and the rest of the judges, what used to be done in such cases: afterwards it was moved again, and North said, it was moved in the House of Lords, that they had left it to the judges to do according to law; and therefore the plea was rejected.

Pasch. 30 Car. 2, in *C. B.*, *Lea v. Wheatley*. ||Vide 5 Term R. 687; 1 Chitt. R. 83.||

By an order, 24 Jan. 1606, in the House of Lords, it was resolved, that no common attorney or solicitor, though employed by any peer, should have the privilege of that house.

2 Stra. 1065.

By an order, 24 May, 1724, this privilege was restrained to menial servants and others, necessarily employed about estates of peers.

By an order, 22 Jan. 1715, it was resolved that every peer should upon his honour certify to the house, that the persons protected were within the privilege of the house; and should by letter acquaint the party arresting such privileged person with the same.

An attorney was taken in execution upon a *ca. sa.* about two years ago, but upon a letter under the hand and seal of the Lord Say and Seal, the sheriff discharged him as steward to his lordship. A rule was obtained at the side-bar for the return of the writ; and now on motion in court to discharge this rule, it was urged in behalf of the sheriff, that this privilege belonged only to the peer, and not to the party, and was not returnable to the process; and that therefore the court ought not to insist upon a return, as the sheriff could not justify the detention of the defendant, but under peril of bringing himself and the plaintiff under the censure of the House of Peers; but on consideration of the above-mentioned orders, and on considering the nature of this case, that the plaintiff was within the ordinary justice of the court entitled to a return of his writ; that without such return he might be debarred from any further execution; but principally from the great inconveniency that might arise by allowing attorneys, who are officers to the courts in which they respectively practise, and therefore amenable to those courts, this kind of privilege; the court gave the plaintiff liberty to proceed against the sheriff, but gave him time till next term to make his return.

Mich. 10 G. 2, in *B. R.*; *Wickham v. Hobart*, 2 Stra. 1065; *Ca. temp. Hardw.* 348, *S. C.*

[But now the statute of 10 G. 3, c. 50, takes away from servants all privilege whatever, personal, as well as privilege from suits.

On the meeting of the new parliament in November, 1774, a doubt was conceived, whether, as this act had thus taken away all privileges from the servants of members, some alteration ought not to be made in the form of the prayer of the Speaker of the House of Commons to the throne; and the then Speaker, Sir Fletcher Norton, at first, it seems, intended to make an alteration, by claiming all the usual privileges, "except where the same had been varied or taken away by act of parliament." But upon con-

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ferring with the Lord Chancellor, Lord Apsley, his lordship said, "that as no alteration had been made formerly, on the passing of the act in King William's time, relating to the privilege of parliament; and as, whatever the Commons claimed, neither the allowance of the king, nor the claim itself could be supposed to include privileges not warranted by law; he was of opinion, that it would be the safer way, in order to prevent any difficulties that might arise from an alteration, to adhere to the usual form; and that he was ready to give the king's answer in the accustomed manner." Sir Fletcher Norton acquiesced in this; and made the claim in the ancient form of words, without any alteration, and received the usual answer, and the same form has been continued ever since.]

β The *charge d'affaires* of a foreign government whose official character has ceased, but is delayed in this country by circumstances, is not liable to arrest in a civil suit.

Dupont v. Pichon, 4 Dall. 321.

The privilege of freedom from arrest of an ambassador's servant is the privilege of the ambassador, and not of the servant.

Fisher v. Begrez, 2 C. & M. 240; 3 Tyr. 184; 4 Tyr. 85; 2 Dowl. P. C. 279. By the 25th section of the act of 30th April, 1790, 1 Story, 88, any writ or process issued from any court or by any judge or justice whereby the person of any ambassador or foreign minister, received as such by the President of the United States, or any domestic servant of such ambassador, &c., may be arrested or imprisoned, or their goods and chattels attached, seized, or distrained, is declared to be utterly null and void; and by the 26th section of the same act—the party suing out the writ, his attorney, and the officers executing the same, are made liable to imprisonment, not exceeding three years, and fine at the discretion of the court—except in the case of a citizen or inhabitant of the United States, for debts contracted before he entered the service of the foreign minister, and domestics whose names have not been registered in the office of the Secretary of State.

The courts of the United States cannot interfere with process issued by a state court against a foreign minister.

Ex parte Cabrera, 1 Wash. C. C. R. 232.*g*

3. In what Cases this Privilege is to be allowed.

In all causes this privilege is regularly to be allowed: so that a peer of the realm, or a member of the House of Commons, is not to be arrested or molested in his person or estate. (a)

Bro. *Exigent*. that a *capias* does not lie against a lord of parliament, nor against an abbot or bishop; but if rescous be returned upon a lord of parliament, a *capias* lies for the contempt. Moor, 767; Finch of Law, 355. (a) The goods of a privileged person taken in execution during the privilege of parliament ought to be re-delivered and freed as well as the person. Jon. 155.

But privilege of parliament doth not extend to high treason, (b) felony, breach of the peace, or surety of the peace.

4 Inst. 25, Prinn's Survey of Parliament Writs. [On the 4th of June, 1614, the Lord Chancellor Ellesmere, in a case then before the House of Lords, declares, "That no privilege of parliament doth protect any man, in case of breach of the peace." So, on the 7th of February and 8th of June, 1757, on a complaint against Earl Ferrers, the lords resolve, "That no peer or lord of parliament hath privilege of peerage or of parliament against being compelled, by process of the courts in Westminster-hall, to pay obedience to a writ of *habeas corpus* directed to him." In the year 1795, the Earl of Abingdon was committed by the Court of King's Bench to the prison of that court as part of the punishment inflicted upon him, being convicted of publishing a libel.] (b) In treason or felony, or misprision of treason or felony, they can only be tried by their peers; but for all other offences, as *præmunire*, riot, seducing a young lady from her parents in order to debauch her, &c., they are to be tried by the country. 2 Hawk. P. C. c. 44, § 13.—That neither *Magna Charta*, nor any other law privileges a peer from being indicted by a grand jury of commoners, either in the King's Bench or before commissioners of oyer or the coroner, &c. 2 Hawk. P. C. c. 44, § 15.—But the Court of B. R. cannot receive the plea of not guilty, or the

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confession of a peer, but only the Lord High Steward; but it may allow a pardon pleaded by a peer to an indictment in that court. 2 Hawk. P. C. c. 44, § 17.—So, if a peer be attainted of treason or felony, he may be brought before the Court of B. R. and demanded what he has to say, why execution should not be awarded against him; and if he plead any matter to such demand, his plea shall be discussed, and execution awarded by the said court, upon its being adjudged against him. 3 Hawk. P. C. c. 44, § 18.—[In the case of Earl Ferrers it was determined by all the judges, that a peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same according to the provisions of the 25 G. 2, c. 37. And supposing the day appointed by the judgment for execution should lapse before such execution done, that a new time may be appointed for the execution, either by the high court of parliament before which such peer shall have been attainted, although the office of high steward be determined, or by the Court of King's Bench, the parliament not then sitting; and the record of the attainder being properly removed into that court. *Fost. Cr. L.* 139.]

And therefore in an indictment for treason or felony, trespass *vi et armis*, assault or riot, process of outlawry shall issue against a peer of the realm; for the suit is for the king, and the offence is a contempt against him. But in civil actions between party and party, regularly, a *capias* or *exigent* lies not against a lord of parliament.

2 Hal. Hist. P. C. 199; 2 Hawk. P. C. c. 44, § 16.

If a peer of parliament be convict of a disseisin with force, a *capias pro fine* and *exigent* shall issue; for the fine is given by statute, in which no person is exempted. (a)

Cro. Eliz. 170, *Ld. Stafford v. Thynne*. Vide *Dyer*, 314. (a) For execution on a statute staple merchant, on the statute of Acton Burnel, or on the statute of 23 H. 8, the body of a Baron shall be taken in execution; for by these statutes, such persons are not exempted. 2 Leon. 173.—So, a custom to commit persons who shall take an orphan out of the custody of a guardian, is good without exception of peers; for a peer is not privileged in this case, and in a *homine replegiando*, where he detains the body, he shall be committed. *Lev.* 162, 163.

So, in debt upon an obligation against the Earl of Lincoln, he pleaded *non est factum*, which being found against him, the judgment was *ideo capiatur*: this on a writ of error brought by him was objected to, in that a *capias* does not lie against a peer of the realm: *sed non allocatur*; for by this plea found against him, a fine is due to the king, against whom none shall have any privilege.

Cro. Eliz. 503, *Earl of Lincoln v. Flowes*.

An information was exhibited in B. R. against the Earl of Devonshire, for striking in the king's palace; which being in time of parliament, he insisted on his privilege of a peer, and refused to plead in chief, but put in his plea of privilege; to which there was a demurrer, and the plea overruled, and he was fined 30,000*l.*

Comb. 49, *The King v. Earl of Devonshire*.

In the case of the seven bishops it was insisted, that peers of the realm could not be committed, in the first instance, for a misdemeanor before judgment; and that no precedent could be shown where a peer had been brought in by a *capias*, which is the first process for a bare misdemeanor, and they put in a plea in writing of their being peers, &c., but the plea was rejected.

3 Mod. 215.

Also peers of the realm are punishable by attachment for contempts in many instances; as for rescuing a person arrested by due course of law; for proceeding in a cause against the king's writ of prohibition; for disobeying other writs wherein the king's prerogative or the liberty of the

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subject are nearly concerned; and for other contempts which are of an enormous nature.

2 Hawk. P. C. c. 22, § 33; 1 Burr. 634.

|| But the courts will not grant an attachment against a peer or member of parliament for non-payment of money according to an award.

7 Term R. 171, 448.||

If a peer be returned on a jury, on his bringing a writ of privilege he may be discharged: also it seems the better opinion, that without such writ he may either challenge himself or be challenged by the party.

Dyer, 314 b; Moor, 767; 9 Co. 49; Co. Lit. 157; Jon. 133; ||Fitz. N. B. 384, and see Russ. & R. Ca. 117. Peers are exempt from serving on juries by 6 G. 4, c. 50, s. 2.||

In the case of Sir Edward Bainton, who was returned on a jury, the court would not force him to be sworn against his will, he being a parliament man, and the parliament then sitting.

Pasch. 27 C. 2, in B. R.

A day of grace shall not be given against a lord of parliament; for he is presumed to be attendant on the service of the public.

9 Co. 49 a.

So, if a peer be made steward of a base court or ranger of a forest, he may, from the dignity of his person, and the presumption that he is engaged in the more weighty affairs of the commonwealth, exercise these offices by deputy; though there are no words for this purpose in his creation.

9 Co. 49 a.

So, if a license be granted to a peer to hunt in a chase or forest, he may take such a number of attendants with him as are suitable to his state and dignity.

9 Co. 49 b.

A peer or lord of parliament cannot be an approver; for it is against *Magna Charta* for him to pray a coroner.

3 Inst. 129.

If a peer of the realm bring an appeal, (a) the defendant shall not be admitted to wage battle, by reason of the dignity of his person.

2 Hawk. P. C. c. 45, § 5. (a) In an appeal brought against him he shall be tried by a jury of commoners, and not by his peers; for the words of *Mag. Char. nec super eum ibimus*, &c., are to be intended only of the suit of the king. 3 Inst. 30; 2 Inst. 49. || Appeals and wager of battle are now abolished by 59 G. 3, c. 46.||

|| A peer of the realm cannot become bail, nor a member of parliament, on account of the difficulty of proceeding against them.

2 Marsh. 232; 4 Taunt. 249.||

In Jenkins the following privileges are laid down as belonging to peers: 1. They are entitled to a letter missive. 2. They (b) have a knight to try an issue which concerns them. 3. They are not to be arrested for debt, trespass, or any personal action. 4. They are exempted from serving on juries. 5. To have no day of grace against them. 6. Upon the trial of a peer for treason or felony, they try him upon their honour only, and not upon oath. 7. When they pass through any of the king's forests to attend upon the king, upon blowing a horn they may have a buck or doe, as the season of the year is. 8. They have a power in their House to reverse judgments given in the King's Bench. 9. They have the benefit of clergy though they cannot read. 10. They

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are not liable to find carriages for the king when he removes from one place to another.

Jenk. 107. (b) This privilege is taken away by 24 G. 2, c. 18, § 4.

|| To these privileges should be added that of franking enjoyed by peers of parliament, and all its other members. On the original settlement of the Post-Office, in 1660, the duty of postage was imposed generally on all his majesty's subjects. A clause was proposed exempting the knights, citizens, and burgesses of the Lower House from the duty. The clause was treated as below the honour of the House, and the Speaker was reluctant to put the question upon it; nevertheless it was carried, but was afterwards omitted in the Lords. This omission occasioned some difficulty in the Commons in passing the bill, to obviate which the ministers gave an assurance to the members that the privilege should be granted, and accordingly a warrant was constantly issued to the postmaster-general, directing the allowance thereof to the extent and under the regulations expressed. At length the privilege was expressly confirmed by the stat. 4 G. 3, c. 24, which adds many new regulations to prevent abuses, which have been subsequently altered by the 24 G. 3, c. 37, and 35 G. 3, c. 53; and by the 42 G. 3, c. 63, these acts are extended to the members of the United Kingdom. The privilege is entirely a privilege of *parliament*, and founded on the parliamentary duties of its members. Therefore a Roman Catholic peer is held not entitled to it.

Parl. Hist. v. 23, p. 56; 3 Hats. 82; 1 Black. C. 322. Lord Petre v. Lord Ancland, 2 Bos. & P. 139.

The answer of a peer on his protestation of honour may be read on the question of costs.

Dawson v. Ellis, 1 Jac. & W. 524.||

4. Of the Commencement and Continuance of this Privilege.

The privilege of the Lords commences from the teste of the writ of summons, and the privilege of a burgess at his (a) election; but if he be arrested or in execution before his election he shall not have privilege.

Moor, 57, 340; Jenk. 118; Dals. 58; Dyer, 59, 60; Latch, 46, 150. (a) Vide 1 Sid. 42; [Sir Richard Temple's case, Pasch. 13 Car. 2. A trial at bar, wherein Sir Richard Temple was defendant, being appointed for this term, he moved the court by his counsel to put off the trial, upon the ground of his being elected a burgess to serve in the next parliament, which was to meet in eight days, and therefore prayed his privilege. But the court doubted whether they could allow the privilege, because it did not appear to them whether it were actually so as he suggested or not, but by affidavit, which they would not admit to prove this suggestion. And it was said by the court, that if he were arrested upon mesne process, or taken in execution, it was proper for the parliament (when they should meet) to discharge him, for the court doubted whether they had the power to do so. The defendant said, that the clerk of the parliament would not make him out a certificate of his election before the meeting of parliament. Upon which Twisden, J., asked, why he could not sue his writ of privilege out of Chancery upon the return of his election? *Quære bien*. But the court refused to grant the motion, because the trial was to come on before the day on which the parliament were to meet.—On the 9th of February, 1625, a motion was made, that Mr. Giffard, returned a member of the House, and then in execution, might be sent for. On this motion being examined into, it appears from a report of the committee of privileges on the 15th, "that one of the burgesses for Bury was elected on the 6th of January; that Mr. Giffard was elected on the 11th of January, but that the indenture was not dated till the 30th of January, the town-clerk conceiving it was to bear date the day of the next county-court; and that Mr. Giffard was arrested on the 23d of January, after his election, but before the return." After much debate and consideration of this difficulty, on the 17th of February, the clerk of the crown, the sheriff of Suffolk, and the town-clerk of Bury,

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were all called up to the table, and there, by order of the House, amended the return from the 30th of January to the 11th; and then it was ordered that Mr. Giffard should have privilege, and be delivered out of execution; and a warrant was issued to the clerk of the crown to bring him up the next day. On the 18th he was accordingly brought in, with the keeper of the gate-house, the bar down; the writ of *habeas corpus* was handed up to the clerk, and the writ and return being read by him, the Speaker discharged Mr. Giffard, and wished him to take the oath, and then his seat in the House. 1 Hats. Prec. 164.—On the 1st of March, 1592, Mr. Serjeant Yelverton, from the committee of privileges and elections, reported the following case:—"Thomas Fitzherbert of Staffordshire, being outlawed upon a *capias utlagatum* after judgment, is elected burgess of this parliament: two hours after his election, before the indenture returned, the sheriff arrested him upon this *capias utlagatum*: the party is in execution: now he sendeth his supplication to this House to have a writ from the same to be enlarged, to have the privilege in this case to be grantable." On the 5th of April the House came to the following resolution: "That Thomas Fitzherbert was, by his election, a member thereof; yet that he ought not to have privilege in three respects: 1st, because he was taken in execution before the return of the indenture of his election; 2d, Because he had been outlawed at the queen's suit, and was now taken in execution for her majesty's debt; 3d, and lastly, In regard that he was so taken by the sheriff, neither *sedente parlamento*, nor *eundo*, nor *redeundo*." Dewes's Journ. 479; 1 Hats. Prec. 107.—On the 4th of July, 1625, the case of Mr. Basset was referred to the committee of privileges, who reported, "that he was imprisoned upon mesne process, and afterwards chosen a burgess." There is a debate in the Journal, whether under these circumstances he were eligible, or to be allowed privilege? Great distinction was made between a person arrested on mesne process, or in execution; and it was at last resolved, upon the question, "That Mr. Basset should have the privilege of the House;" and a warrant was ordered to the marshal to bring him up the next morning, which was done accordingly. 1 Hats. Prec. 163.]

So persons outlawed ought not to be knights or burgesses of parliament; and such persons outlawed may be arrested by *cap. utlag.*, privilege of parliament notwithstanding.

And. 293.

As to the time and exact continuance of this privilege, it seems in good measure unsettled even at this day. It is, indeed, agreed in most books that members of parliament have privilege *eundo, morando, (a) et redeundo*; and that they are entitled to privilege as well after a dissolution as a prorogation of the parliament.

Atkin's Power of Parl. 38; 4 Inst. 44; Brownl. 91; Memorials, 88, 103, 180; Sir Simon Dewes's Journals, 414. [See 1 Johns. Ca. 415, Colvin v. Morgan.] [The writ of privilege in the case of Trewynnard, in the 36th and 37th H. 8, is to persons "*venientes seu venire intendentes*." Prinn's Fourth Register, 780.] (a) By the 35 H. 8, c. 11, members of parliament have their wages so many days after the parliament as they may reasonably spend on their return home. Vide Rast. 664, Appendix to Reg. 1.

§ Members of Congress are privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same.

Const. U. States, art. 1, sect. 6; and see Lewis v. Elmendorf, 2 Johns. Ca. 222; Colvin v. Morgan, 1 Johns. Ca. 415; Cory v. Russell, 4 Wend. 204; United States v. Cooper, 4 Dall. 341; King v. Coit, 4 Day, 133; Gibbs v. Mitchell, 2 Bay, 406.

By two orders of the House of Lords, one dated the 28th of May, 1624, the other the 27th of January, 1628, it is declared, that their privilege commences from the teste of their writ of summons to parliament; and that upon every session and prorogation, their privilege is for twenty days before and twenty days after each session, which one of the orders says is time enough for them to come from all parts of the realm, and to return; but the Commons never assented to this, for they claim (b) forty days before and after each session.

2 Lev. 72; Chan. Ca. 221; Sid. 29, pl. 2; Keb. R. 3, pl. 7. (b) In Cotton Record. 704, they claim forty days. So, by Jenk. 118.

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[On the 27th of February, 1586, the House was informed, that one William White had arrested Mr. Martin, a member of the House of Commons; therefore it was ordered, "That the serjeant should warn White to be here to-morrow, sitting the court." On the 6th of March, William White was brought into the House, to answer his contempt for arresting Mr. Martin; who answered, "that he caused him to be arrested the 22d day of January, which was above fourteen days before the beginning of the parliament." The House upon this appoint a committee to search precedents, who, on the 11th of March, make report "of Mr. Martin arrested upon a mesne process by White, above twenty days before the beginning of this parliament, holden by prorogation, (mistaken for adjournment,) and in respect that the House was divided in opinion, Mr. Speaker, with the consent of the House, moved these questions to the House: 1st, Whether they would limit a time certain, or a reasonable time, to any member of the House for his privilege? The House answered, A convenient time. 2d, Whether Mr. Martin was arrested within this reasonable time? The House answered, Yea. 3d, If White should be punished for arresting Martin? The House answered, No; because the arrest was twenty days before the beginning of the parliament, and unknown to him, that would be taken for reasonable time. But the principal cause why Martin had his privilege, was, for that White, the last session (mistaken for meeting) of parliament, arrested Mr. Martin, and then knowing him to be a burgess for this House, discharged his arrest; and then afterwards Mr. Martin, again returning to London to serve in the House, Mr. White did again arrest him; and therefore the House took in evil part against him his second arrest, and thereupon judged, that Martin should be discharged of his second arrest out of the Fleet by the said Mr. White."

Dewes's Journ. p. 410.

It is observed upon the above case, that this parliament met on the 29th of October, 1586; on the 22d of December they were adjourned by commissioners from the queen to the 15th of February following; so that this arrest was either before the beginning of the parliament, or during a prorogation, but on the 22d of January, during an adjournment, and consequently clearly within privilege. For an adjournment, even for a very long period, would not affect privilege, as we may collect from the Journals of the House of Commons of the 1st of June, 1621, and the printed debates of that session, when it was ordered, agreeably to the opinion and advice of Sir Edward Coke, Mr. Noy, Mr. Hakewill, and others, "that during that adjournment," (which was for above five months, from the 4th of June to the 14th of November,) "no suits against members, or their servants, should be proceeded in, in any court of law; and if they were, that a letter should issue, under the Speaker's hand, for the party's relief therein, as if the parliament was sitting; and the party refusing to obey it to be censured at the next access." And a similar resolution was about the same time come to by the Lords. For upon the 2d of June, 1621, the Lords consulted the Judges upon this question; and they having answered, on the 4th of June, that they could not satisfy their lordships of any precedents of the continuance of their privileges, during all the time of the long cessation, the Lords notwithstanding resolve, "That they do know, that the privileges of themselves, their servants and followers, do

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continue, notwithstanding the adjournment of the parliament; and they order and adjudge the same to be observed in all points accordingly."

1 Hats. Prec. 100. This restriction as to suits was afterwards limited by stat. 12 & 13 W. 3, c. 3, to an adjournment of 14 days.

On the 22d of January, 1628, Mr. Rolle complained of goods being seized by an officer of the customs for dues; and this complaint was immediately referred to the consideration of a select committee. The substance of the case was, that these goods were seized by the customs, or those who had a lease of the customs, for refusing to pay the duties of tonnage and poundage, which the Commons had not yet granted to the king, but which the king, as appears from his warrant in the eighth volume of the Parliamentary History, p. 311, had directed to be levied by his own authority. The House, on the report from the grand committee upon this violation of their privileges, resolve, 1st, That every member of this House is, during the time of privilege of parliament, to have privilege for his goods and estate; 2d, That the 30th of October last was within the privilege of parliament; (a) and 3d, That Mr. Rolle ought to have privilege for his goods seized the 30th of October last, the 5th of January last, or at any time since.

(a) The House had been prorogued from the 20th of June to the 20th of October, and then further prorogued to the 20th of January. When King Charles the Second intended to prorogue the parliament from the 27th of July, 1663, to the 16th of March following, a space of eight months, he said in his speech to both Houses of parliament upon that occasion, "I think it necessary to make this a session, that so the current of justice may run the two next terms without any obstruction by privilege of parliament, and therefore I shall prorogue you to the 16th day of March." *Lords' Journ.* 417.]

In the case of Colonel Pit, the parliament was prorogued 16th April, 1734, dissolved the 17th, and the new writs bore teste the 18th following, and the defendant Pit, who was a member of that parliament, was arrested on the 20th. One of the questions in this case was, Whether the arrest was within time of privilege? And it was determined that it was, although the defendant had lived for two years before no farther distant from London than Hammersmith; but the court did not think it necessary, in the determination of this cause, to ascertain the exact time of privilege members of the House of Commons were entitled to after a dissolution of parliament.

Trin. 8 G. 2, in *B. R.*, Col. Pit's case; 2 *Stra.* 985; *Fortesc. R.* 159, 342; *Barnard. K. B.* 442; *Com. R.* 44.

[The only statutory declarations of the duration of privilege in any instances, are the above statute of 12 & 13 W. 3, c. 3, and the 4 G. 3, c. 24, & 24 G. 3, c. 37; by which two last statutes the right of members to send their letters free from postage is ascertained to continue during the sitting of parliament, and within forty days before, and forty days after, any summons or prorogation of the same.

This point, though left undefined by the British parliament, is in Ireland ascertained by a statute of the legislature of that country; viz., 3 E. 4, c. 1, and limited 'o forty days before and forty days after the conclusion of the parliament.]

5. *How Privilege is to be claimed and taken Advantage of.*

It seems that formerly the usual, and indeed necessary, way of taking advantage of privilege was to plead the same, or to bring a writ of privi

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lege; and that applications in other manner, or even by motion u. court, were held insufficient.

Dals. 16; Stil. 177, 186, 214, 222. [But so early as the 44th of H. 8, Ferrers, a member in execution, was delivered by the sergeant without any other warrant than his mace, even though the Lord Chancellor ordered a writ of privilege. Holling. Chron. 1 Hats. Prec. 53; Dyer, 61 a. But *qu.* of this case, and *vide infra.*]

It is too late to claim privilege, after trial or a confession of judgment.

Geyer's Lessee v. Irwin, 4 Dall. 107. But not after the entry of bail. United States v. Edme, 9 S. & R. 147; Blackiston v. Potts, 2 Miles, 388. But see Mannhardt v. Soderstrom, 1 Binney, 138; Livingston's case, 8 Johns. 351. And see also Sugars v. Concanen, 5 Mees. & W. 30; 7 Dowl. 391. It is no ground of defence in an action against the bail. Fletcher v. Baxter, 2 Aik. 224; Bidgood v. Davies, 6 B. & Cress. 84. It cannot be pleaded, or put in issue to a jury, but is ground for a motion to the discretion of the court. *Ibid.*; and Prentiss v. The Commonwealth, 5 Rand. 697.

As where the defendant, being a Burgess of parliament, brought a (a) letter from the Speaker to the King's Bench, to stay, &c., it was disallowed by the court; for, as the book says, it ought to have been a writ of privilege: and in this case it was said, that when Thorpe was Speaker, he had a general *supersedeas* for all actions against him; and this was held ill, for he ought to have had a particular *supersedeas* for each action.

Noy, 83; Latch, 48, 150, Hodges v. Moor. (a) See ord. House of Commons, 1st June, 1621, *suprà*.

A person chosen to serve in parliament shall not have privilege before the day of session: for there is no clerk of parliament to certify, and the court will not admit affidavits in that case; he ought to sue his writ of privilege in Chancery, on the return of his election.

Sid. 42, pl. 9; Kel. R. 3, pl. 7; T. Raym. 12. See Fortesc. R. 162, and the cases *suprà*.

Lord Banbury was indicted of murder by the name of Charles Knollys, Esq., and he pleaded in abatement, that by letters patent K. Car. 1 created his grandfather Earl of Banbury, and so showed the descent to him, and prayed judgment of the indictment, because he was not named earl. The attorney-general replied, that upon his petition to the House of Lords to be tried by his peers, the Lords dismissed his petition, and disallowed his peerage, &c., and upon demurrer, the replication was held to be naught, and the plea good, and the indictment abated. In this case the following points were determined: 1st, That it was not necessary for the defendant in his plea to aver that Banbury was within any county in England; for that in reality there is not any necessity that he should be created of any place. 2dly, That it was not necessary for the defendant to aver that he was *unus parium regni Angliæ*; for whatever is done under the great seal of England, ought to bear relation to England; and to suppose him a peer of Ireland is a foreign intendment, and ought to be rejected. 3dly, That the conclusion of his plea, *et hoc paratus est verificare unde ex quo*, without *prout patet per recordum*, or producing a writ to certify that he was an earl, was sufficient; (b) though baron or not baron is regularly to be tried by the record of his having sat in parliament: but herein the court took a difference between a creation by writ, and that by patent; and held, that in the latter case his sitting or not sitting in parliament was not material, as his creation was by patent, which gave him all the privileges of a peer, though he had never sat in parliament: besides, his plea does not barely consist of matter of record, but the descents are matters of fact (c) which might be traversed, and tried by a jury. 4thly, It was held, that the re-

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plication did not avoid the defendant's plea, nor was he concluded from his peerage by the order of the House of Lords; 1st, Because in an original cause the Lords have no jurisdiction, i.e. is there any precedent of their having ever determined a right of peerage without a previous petition to the king, who is the fountain of honour, and the king's reference to them. 2dly, that this dismissal can amount to no more than an ordinance of one part of the legislature, and such ordinance cannot divest the party of that in which he hath a freehold and inheritance, and in whose advice and services the king and commonwealth are interested. 3dly, That this dismissal does not amount to a judgment of parliament, and therefore cannot be pleaded in bar to the defendant.

2 Stra. 989; 2 Salk. 509, pl. 1; Skin. 336, pl. 2; Carth. 297; Comb. 273; Ld. Raym. 10, S. C.; The King and Queen v. Knollys *al.* Lord Banbury, Trin. 6 W. & M. in B. R. (b) 22 Ass. 24; Bro. Ass. 240; 35 H. 5, 46; 6 Co. 53; 9 Co. 31; F. N. B. 247; Regist. 287; Cro. Car. 205. (c) A trial of peerage in some cases shall be by the country, as where a duchess is ennobled by marriage. 6 Co. 55.

A bill of Middlesex was issued out of B. R. by an attorney of the court, against the Countess of H, which was discharged by *supersedeas* without pleading; because it appeared by the record that she was a peeress, and the attorney committed for suing out the process.

Vent. 298, Countess of Huntingdon's case. [Vide *infra*.]

A motion was made in the behalf of the Lord Banbury for a *supersedeas* to a *latitat* which was issued out of the court of B. R. against him, and on which he had been taken; and to induce the court to grant it, they offered to produce an exemplification of the judgment in the indictment in this court against my Lord, and the letters patent of creation, and an affidavit that my Lord was the same person in the record of the judgment; and it was also pretended, that if my Lord should put in bail he would be estopped to plead his peerage. But the court denied the motion, and the Ch. J. said, that they could not take notice that this Charles Knollys is Earl of Banbury; that there was a difference between this case and the case of a peer that had sat in the House of Lords. If my Lord had been ever summoned to parliament and had a writ to show, and there were no dispute about the identity of the person, it would have been reasonable to have granted a *supersedeas*; but in this case of a lord who has never sat, they could not do it; for they could not try peerage on a motion, but his Lordship might plead it, and pray a *supersedeas*.

2 Ld. Raym. 1247; 2 Salk. 512, pl. 2, S. C.

Villars was arrested as J. Villars, Armiger, and pretended himself to be Earl of Buckingham; and upon a motion, the question was, How he should put in bail so as not to estop himself? *Et per cur.*, he need not join in the recognisance, and then there is nothing to estop him; for the act of others cannot conclude him.(a)

Salk. 3, pl. 7; Smith v. Villars, Stil. 454. ||(a) But now it is decided that a defendant is estopped by the recognisance of bail from pleading a misnomer, though he himself be no party to the recognisance. 2 New R. 453.||

If a bishop has occasion to plead to the jurisdiction of a court, he must plead that he is *unus de paribus hujus regni Angliæ*; for he has no patent to produce in testimony of his peerage, but is only a peer *ratione baroniæ* which he holds *in jure ecclesiæ*; otherwise, of a temporal peer.

4 Inst. 15; Skin. 521.

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In the case of Colonel Pit, who was arrested two days after the dissolution of that parliament of which he was a member, and which was held to be within time of privilege, the question of the greatest difficulty was, How he should be relieved, and whether he could not be discharged on motion without bringing his writ of privilege? And it was held by ten judges, that though a writ of privilege was heretofore held a sure and legal remedy, that notwithstanding, and especially since the statute 12 & 13 W. 3, c. 3, which expressly provides that no person entitled, &c., shall be arrested during time of privilege, that he might be discharged on motion; for the judges are to take notice of every act of parliament, and to take care that they be duly executed; and this method was since the making of the above-mentioned statute thought more advisable by the judges than a plea or writ of privilege, as the act does not make the process void, but only avoidable; and as there could be no plea to a process for irregularity which is aided by the appearance of the party. And this case was compared to an arrest of an ambassador's servant contrary to the 7 Ann. c. 12, § 3, and to an arrest on a Sunday against the statute 29 Car. c. 7, and to other cases of privilege, as when a juror or witness, or the plaintiff himself, is arrested in going to or returning from the court; who are all discharged upon motion.

Mich. 7 G. 2, Col. Pit's case, at Serjeants' Inn; 2 Barnard. K. B., 423, 433, 448; Com. R. 444, pl. 208; 2 Str. 905; Fortesc. R. 159, 342. [Col. Pit was first brought up by *habeas corpus* into the Court of Common Pleas; but as he had been taken by process out of the King's Bench, the Court of Common Pleas refused to interfere, and remanded him. *Dutton v. Pit*, Barnes, 199.]

β The courts of the United States cannot interfere with process issued by a state court against a foreign minister.

Ex parte Cabrera, 1 Wash. C. C. Rep. 232. For the proper court to give relief in case of the arrest of a privileged person, see *United States v. Edme*, 9 Serg. & R. 147; *Commonwealth v. Hambright*, 4 Serg. & R. 149; *Livingston's case*, 8 Johns. 351; *Kinsman v. Reinex*, 2 Miles, 200; *Pitt v. Evans*, 2 Dowl. P. C. 223; case of *Cogg*, 6 Dowl. P. C. 461; *Attorney-general v. Skinner's Comp.* 8 Sim. 377; 1 Coop. 1.β

6. What shall be deemed a Breach of Privilege.

The privilege, order, or custom of parliament, either of the Upper House or House of Commons, belongs to the determination or decision only of the court of parliament; so that they are the proper judges of all breaches of privilege, of which the courts of Westminster only take notice incidently.

13 Co. 63, 64; *Prinn's* 4 Inst. 16; *Cro. Car.* 181, 604.

And accordingly, in the case of *Patty* and others, who were committed to Newgate for a breach of privilege in commencing and prosecuting actions at common law against the late constable of Ailesbury,^(a) the Court of K. B., by the opinions of three judges against *Holt*, C. J., refused to relieve or discharge them on a *habeas corpus*, this being a parliamentary matter in which the House of Commons are the sole judges.

2 Ld. Raym. 1105, *The Queen v. Patty*. (a) See the case of *Ashby v. White*, 6 Mod. 45; 2 Ld. Raym. 938; 1 Salk. 19.

So, in the case of one *Ferrers*, the sheriff was committed for detaining a member in execution.

Dyer, 61. [Before this case of *Ferrers*, the House, if in truth the privilege of parliament extended to persons in execution, had been very tender in their mode of exerting it. It had, indeed, been the practice to release members in confinement in execution,

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but this had not been done by any immediate authority of the House itself, or even by writ of privilege, but by petition by the Commons to the king, and a special act of parliament for that purpose, an act being supposed to be necessary as well to protect the jailer from an action for the escape, as to secure the debt of the creditor, who would otherwise have lost his right to a new execution. See the cases of Lark, Rot. Parl. 8 H. 6, No. 57; of Clark, Rot. Parl. 39 H. 6, No. 9; and of Hyde, Rot. Parl. 18 E. 4, No. 55. There can be no doubt, however, of the existence of such privilege at present, as the stat. Jac. 1, c. 13, which is a general law passed for the purpose of obviating in all cases the difficulties which were the objects of the above-mentioned special acts, expressly provides, "That nothing therein contained shall extend to the diminishing of any punishment, to be thereafter by censure in parliament inflicted upon any person which thereafter should make, or procure to be made, any such arrest as is aforesaid," that is, any arrest in execution; and is therefore a parliamentary declaration, that, during the privilege of parliament, it is not lawful to arrest, even in execution, any member of either house of parliament. We cannot help remarking with what a high hand the privilege was asserted in Ferrer's case; for though, as we have before mentioned, it had not been the practice in any preceding time to release members in execution without a special act of parliament, yet it appears that Ferrers was delivered by the serjeant without any other warrant than his mace, even though a writ of privilege was offered by the Lord Chancellor; that the persons who opposed the delivery were imprisoned by the House of Commons, some in the Tower, and some in Newgate; and the creditor himself, who procured the arrest, was also committed for the contempt of the privilege of parliament. And these powers, according to Hollinghead, were admitted by all the judges of England to be legal. Hollingh. Chron. and 1 Hats. Prec. 53. Dyer too, in his argument as counsel in Trewynard's case, (Dy. 61 a,) cites the case of Ferrers, to show what the law was in this respect; but when, in a subsequent case, he was delivering his opinion as judge, he said, "If a man be condemned in debt or trespass, and be elected a member of parliament, and then be taken in execution, he cannot have the privilege of parliament; and so it was holden by the sages of the law, in the case of Ferrers, in the time of Henry the Eighth. And though privilege was at that time allowed, *eo fuit minus just.*" Moor, 57, pl. 153. We may add that even since the statute of 1 Jac. 1, c. 13, no instance occurs where any person entitled to privilege, if in custody in execution, hath been delivered by any other mode than by virtue of a writ of privilege, or by a writ of *habeas corpus*, issued in obedience to a warrant under the Speaker's hand, some formal process being deemed necessary to give the act its full operation. See Sir Thomas Shirley's case, 5 Parl. Hist. 113, and 1 Hats. Prec. 155.]

But where in *assumpsit* the defendant pleaded the statute of limitations, and the plaintiff replied that the defendant was a parliament man, &c., the plea was overruled; because one may file an original against a parliament man, and continue it down without any breach of privilege, here being no actual molestation of his person or estate; and that this should be so is of absolute necessity in order to save the bar of the statute, for such case not being provided by an exception the plaintiff would be barred of his action, though he could not file an original.

Sir George Binion v. Evelin, Lev. 111; Mod. 145; 2 Salk. 512, pl. 2; Show. 99; Carth. 137; 2 Ld. Raym. 1113, S. C.

So a man whilst member of parliament may alien his estate by fine with proclamations; and a person who has a right may be necessitated to commence an action to save the bar that would incur against him by the statute of 4 H. 7, c. 24.

2 Ld. Raym. 1113, *per* Holt, C. J.

So one may commence an action against a member of parliament that is executor.

2 Ld. Raym. 1113, *per* Holt, C. J.

7. Of the Proceedings in Courts by and against Persons entitled to Privilege of Parliament.

By the statute 12 & 13 W. 3, c. 3, § 1, it is enacted, "That any person may prosecute any suit in any of his majesty's courts at Westminster,

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or Chancery, or Exchequer, or the Duchy Court, or in the Court of Admiralty; and in all causes matrimonial and testamentary in the Court of Arches, the Prerogative Courts of Canterbury and York, and the Delegates, and all courts of appeal, against any lord of parliament, or any of the knights, citizens, and burgesses of the House of Commons, or their servants, or any other person entitled to privilege of parliament, at any time immediately after the dissolution or prorogation of parliament, until a new parliament shall meet, or the same be re-assembled, and immediately after any adjournment of both houses for above fourteen days, until both Houses shall meet; and the said courts may, after such dissolution, prorogation, or adjournment, proceed to give judgment, and to make final decrees and sentences thereupon; any privilege of parliament notwithstanding."

¶ For the history of this statute, and the alterations it underwent in the Lords, vide 2 H. Bl. 273, 274, 300, &c.]]

§ 2. "Provided that this act shall not subject the person of any of the knights, citizens, and burgesses, or any other person entitled to privilege of parliament, to be arrested during the time of privilege; nevertheless if any person have cause of action or complaint against any peer, such person, after such dissolution, prorogation, or adjournment as aforesaid, or before any sessions of parliament, may have such process out of his majesty's Courts of King's Bench, Common Pleas, and Exchequer, against such peer as he might have had out of time of privilege; and if any person have cause of action against any of the knights, citizens, or burgesses, or any other person entitled to privilege of parliament, after any dissolution, prorogation, or such adjournment, &c., such person may prosecute such knight, citizen, or burgess, or other person entitled to privilege, in his majesty's courts of King's Bench, Common Pleas, and Exchequer, by summons and distress infinite, or by original bill and summons, attachment and distress infinite, which the said respective courts are empowered to issue, until they enter a common appearance, or file common bail; and any person having cause of suit or complaint may, in the times aforesaid, exhibit any bill or complaint against any peer, or against any of the said knights, citizens, or burgesses, or other person entitled to privilege, in the Chancery, Exchequer, or Duchy Court, and proceed thereupon by letter or *subpoena* as usual; and upon leaving a copy of the bill with the defendant, or at his last place of abode, may proceed thereon, and for want of an appearance or answer, or for non-performance of any order or decree, may sequester the estate of the party, as is used where the defendant is a peer, but shall not arrest the body of any of the said knights, citizens, and burgesses, or other privileged person, during the continuance of privilege of parliament."

And § 3. "Where any plaintiff shall by reason of privilege of parliament be stayed from prosecuting any suit commenced, such plaintiff shall not be barred by any statute of limitation, or nonsuited, dismissed, or his suit discontinued for want of prosecution, but shall upon the rising of the parliament be at liberty to proceed."

And § 4. "No suit or proceeding in law or equity against the king's original and immediate debtor, for the recovery of any debt originally and immediately due to his majesty, or against any person liable to render an account to his majesty, for any part of his revenues, or other original or immediate duty, or the execution of any such process, shall be impeached or delayed by privilege of parliament; yet so that the person of such debtor or account-

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ant, being a peer, shall not be liable to be arrested, or, being a member of the House of Commons, shall not, during the continuance of privilege, be arrested by any such proceedings."

§ 5. "This act shall not give any jurisdiction to any court to hold plea of any real or mixed action in other manner than such court might have done before."

[By the 2 & 3 Anne, c. 18, an act for the further explanation and regulation of privilege of parliament, in relation to persons in public offices, it is enacted, "That any action or suit may be commenced or prosecuted against any officer or person intrusted or employed in the revenue, &c., for any forfeiture, misdemeanor, or breach of trust, &c., and shall not be stayed or delayed by or under colour or pretence of any privilege of parliament, although such officer or person be a peer of the realm, or lord of parliament, or one of the knights," &c.

Provided, "That nothing therein shall extend to subject the person of such officer, being a peer of the realm, or lord of parliament, to be arrested or imprisoned; but that all process shall issue against such officer or person, being a peer of the realm, or lord of parliament, as should have issued against him out of the time of privilege; nor shall extend to the person of such officer, being a knight, citizen, or burgess of the House of Commons, to be arrested or imprisoned, during the time of privilege of parliament; and that against such officer or other person, being a knight, citizen, or burgess of the House of Commons, entitled to privilege, shall be issued summons and distresses infinite; which the said respective courts are hereby empowered to issue in such case, until the party shall appear upon such process, according to the course of such respective courts."

The act of 12 & 13 W. 3, c. 3, restraining only the privilege of parliament in actions or suits commenced in the courts therein specified, by the 11 G. 2, c. 24, in amendment of the act of King William, it is enacted, "That any person and persons shall and may commence and prosecute, in Great Britain or Ireland, any action or suit in any court of record, or court of equity, or court of admiralty; and in all causes matrimonial and testamentary, in any court having cognisance of causes matrimonial and testamentary, against any peer or lord of parliament of Great Britain, or against any of the knights, citizens, and burgesses of the House of Commons of Great Britain, for the time being, or against them and any of their menial and other servants, or any other person entitled to the privilege of the parliament of Great Britain, at any time from and immediately after the dissolution or prorogation of any parliament, until a new parliament shall meet, or the same be re-assembled; and from and immediately after any adjournment of both houses of parliament, for above the space of *fourteen days*, until both houses shall meet or re-assemble; and the said respective courts may proceed," &c.

Provided, "That the said act shall not extend to subject the person of any knight, &c., to be arrested during the time of privilege. And § 2 authorizes proceeding as above in any of the courts of *great sessions in Wales, courts of session in the counties palatine of Chester, Lancaster, and Durham; the Courts of King's Bench, Common Pleas, and Exchequer, in Ireland*, after any such dissolution, &c. And the *Court of Chancery in Ireland, and equity of Exchequer*, are authorized to proceed in like manner as the *Court of Chancery and equity Court of Exchequer in England* may against any peer, knight, &c., after such dissolution," &c.

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§ 3. Saves the statute of *limitations* in like manner as the act of King William.

And by § 4, No action or suit commenced against the *king's debtor*, &c., to be stayed in any court in England or Ireland, as by § 4, in the act of King William.

And lastly, by the stat. 10 G. 3, c. 50, the preamble of which states, that the acts already in being are insufficient to obviate the inconveniences arising from delay of suits, by reason of the privilege of parliament, it is enacted, "That any person or persons shall and may, *at any time*, commence and prosecute any action or suit, in any court of record, or court of equity, or of admiralty; and in all causes matrimonial and testamentary, in any court having cognisance of causes matrimonial and testamentary, against any peer or lord of parliament of Great Britain; or against any of the knights, citizens, or burgesses, and the commissioners for shires and burghs of the House of Commons of Great Britain, for the time being; or against their or any of their menial or any other servants, or any other person entitled to the privilege of parliament of Great Britain; and no such action, suit, or any other process or proceeding thereupon shall, at any time, be impeached, stayed, or delayed, by or under colour or pretence of any privilege of parliament."

2. Provided, that "Nothing in this act shall extend to subject the person of any of the knights, citizens, and burgesses, or the commissioners, &c., for the time being, to be arrested or imprisoned upon any such suit or proceedings."

3. And whereas the process by *distringas* is dilatory and expensive: for remedy thereof, be it enacted, "That the court out of which the writ proceeds may order the issues levied from time to time to be sold; and the money arising thereby to be applied to pay such costs to the plaintiff as the said court shall think just, under all the circumstances, to order; and the surplus to be retained until the defendant shall have appeared, or other purpose of the writ be answered."

4. Provided, always, when the purpose of the writ is answered, that then the said issues shall be returned; or if sold, what shall remain of the money arising by such sale shall be repaid to the party distrained upon.

5. And it is further enacted, "That obedience may be enforced to any rule of his majesty's courts of King's Bench, Common Pleas, or Exchequer, against any person entitled to privilege of parliament, by distress infinite, in case any person or persons entitled to the benefit of such rule shall choose to proceed in that way: and the last clause extends them to Scotland."

||The mode of proceeding by *distringas* against persons having privilege of parliament being found extremely dilatory and expensive, it was enacted by 45 Geo. 3, c. 124, § 3, that "when any summons, or original bill and summons, shall be sued out against any person having privilege of parliament, and no such affidavit shall be made and filed as therein mentioned, if the defendant shall not appear at the return of the summons, or within eight days after such return, the plaintiff, on affidavit being made and filed in the proper court of the service of such summons, which shall be filed *gratis*, may enter an appearance for defendant, and proceed thereon as if such defendant had entered his appearance."

See Tidd, 118, (8th ed.)||

It has been always held, that a peer is to put in his answer to a bill in

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equity on his honour (a) only, and not on his oath; but when he is examined as a witness, (b) he must be sworn.

(a) The 6th May, 1628, it was resolved by the House of Lords, that the nobility of this kingdom are of ancient right to answer in all courts as defendants upon protestation of honour only, and not upon the common oath. W. Jon. 155; Fortesc. R. 395. (b) Dyer, 314; Jon. 153; 2 Mod. 99; 3 Keb. 631.

Also, if a peer is by order of court to be examined on interrogatories, or to make an affidavit, the same must be on oath.

2 Salk. 513; and Freem. 422, pl. 566. Vide Prec. Chan. 92.

As where the Lord Stourton brought a bill against Sir Thomas Meers to compel him to a specific performance of articles for the purchasing of Lord Stourton's estate, Sir Thomas in his defence insisted that there were defects in Lord Stourton's title to the estate; and it being ordered that Lord Stourton should be examined on interrogatories touching his said title, it was objected, that Lord Stourton, being a peer of the realm, ought to answer upon honour only; but it was ruled by Lord Harcourt, that though privilege of peerage did allow a peer to put in his answer upon honour only, yet this was restrained to an answer; and that as to all affidavits, or where a peer is examined as a witness, he must be upon his oath; and that this examination upon interrogatories being in a cause wherein his lordship was plaintiff, to enforce the execution of an agreement, as his lordship would have equity, so he should do equity, and allow the other side the benefit of a discovery, and that in a legal manner; and accordingly ordered Lord Stourton to put in his examination on oath.

1 P. Wms. 146, pl. 39; 2 Salk. 51; S. C. Sir Thomas Meers v. Lord Stourton.

|| Lord Eldon allowed the answer of a peer on his protestation of honour to be read on the question of costs.

Dawson v. Ellis, 1 Jac. & W. 524.||

It hath been held, that though a court of equity will not proceed against a member that has privilege of parliament, yet if a parliament man sues at law, and a bill is brought here to be relieved against that action, the court will make an order to stay proceedings at law till answer or further order.

Vern. 329.

R T being chosen a burgess for Buckingham, and having a trial at bar to be had on Tuesday before the sitting of the parliament, moved to have his privilege allowed him; but was denied, in regard the parliament was not sitting nor to sit till after the trial had.

Raym. 12; Sid. 42, S. C.

It hath been held, that in an action founded on the above-mentioned statute 12 & 13 W. 3, c. 13, the defendant shall have an imparlance; and it was said in this case, that the practice is to file a bill in nature of a special *capias* against the defendant, and then to summon him; and if he appears upon such summons, the plaintiff may declare against him, as *in custodiâ marescalli*.

Hil. 10 G. 1, in B. R., Wadsworth v. Handiside.

Peers are entitled to a letter missive, which method was introduced upon a presumption that peers would pay obedience to the Chancellor's letter; and is founded on that respect that is due to the peerage.

Jenk. 107.

If the lord doth not appear upon the letter, a *subpœna* on motion is

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awarded against him; because no subsequent process can be awarded but upon a contempt to the great seal; and the Chancellor's letter is only *ex gratiâ*.

If, on the service of the *subpœna*, the peer doth not appear, or if he appears, and does not put in his answer, no attachment can be awarded against him, because his person cannot be imprisoned; but the proceedings must be by sequestration, unless cause, &c., and this is regularly made out, upon affidavit made of the service of the letter and the *subpœna*, though sometimes it is moved for without, since the peer may show want of service at the day assigned to show cause why the sequestration should not issue; and this order for a sequestration is never made absolute without an affidavit of the service of the order to show cause, and a certificate of no cause shown.

2 Vent. 342; Har. Chanc. Pract. 50; Gilb. Chanc. 65, 66; 3 Seld. 1543.

A bill being filed against a peer or peeress, the first application is for my Lord Chancellor's letter returnable in term time; or it may be *immediate*, if the peer or peeress lives in town; but in this case there must be an affidavit, that the original letter is left with the peer at his house, with a copy of the petition as answered; and therewith also is left an office copy of the bill signed by the six clerk; for if the bill is not signed, the service is irregular.

This letter is only a compliment, and no process to found proceedings on; so that a peer may appear or not, as he pleases; if he fails, a *subpœna* issues against him, and his time for appearing and answering being out, an attachment must be actually sealed and entered against him, though never executed, to ground a sequestration upon. It is a motion of course for a sequestration upon an attachment for want of an answer.

The peer must be personally served with this order, and he hath eight days to show cause after personal service of the order; if no cause, the order is absolute; but if the sequestration is for want of an appearance, and he appears, the plaintiff must run the same race over again for want of answer, and the peer must pray time to answer, as suitors do.

The proceeding is the same against a member of the House of Commons: there, the party proceeds by way of sequestration, only with this difference, that instead of a letter there is always a *subpœna* sued out; and when a cause either against a peer or a commoner stands in the paper, and is called, and cannot proceed, (privilege (*a*) being in,) the court never strikes it out, as they do in other cases where the party is not ready, but they let it stand over from one term to another, till privilege is out, and never put the party to sue out a new *subpœna* to hear judgment. And the direction of the court to the registrar is to put all privileged causes (which have been put off on that account) the very first causes in the paper when the court sits after privilege is out.

(*a*) This was before 10 G. 3, c. 50, which enacts, that privilege shall not delay proceedings in law, equity, or ecclesiastical courts.

A sequestration was granted, unless cause, against the Lord Clifford for want of an answer; he afterwards put in an answer, which being reported insufficient, it was moved for a sequestration absolutely, an insufficient answer being as no answer. But the court thought it a hardship, in the case of a peer or member of the House of Commons, that a sequestration, which in some respects is in the nature of an execution, should be the first

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process against them, and therefore allowed, that in case of an answer which is reported insufficient, the plaintiff is to move again *de novo*, for a sequestration *nisi*.

2 P. Wms. 385, pl. 117, Ld. Clifford's case.

[The cause shown against an order *nisi* for a sequestration for want of an answer from a member of the House of Commons, was, an answer come in; to which it was replied on the part of the plaintiff, that as exceptions were taken, it was no answer, and therefore the order ought to be made absolute. On the other hand was cited the above case of Lord Clifford. But by Lord Chancellor—If there is a sequestration *nisi* for want of an answer against a member of parliament, and he puts in an answer before the order is made absolute, and exceptions are taken to his answer, the court *will enlarge the time for showing cause*, till it shall appear whether the answer is sufficient or no. Mr. Goldsborough, who said, when Lord Clifford's case was before the court, that it was the standing rule of the court there should be a new sequestration *nisi* in this case, was a good officer, but yet I should think what I have mentioned is the proper medium. But his lordship at present allowed the cause, as it was the course of the court.

Butler v. Rathfield, 3 Atk. 740.]

||By 47 Geo. 3, sess. 2, c. 40, when any bill or information shall be exhibited in any court of equity against any knight, citizen, or burgess of the House of Commons, it shall not be necessary to leave a copy of the bill or information with the defendant, or at his house or last place of abode, as is now used, but it shall be lawful for the person exhibiting such bill, &c., to proceed, for want of appearance or answer, to sequester the real and personal estate of such knight, &c., although no copy of the bill, &c., shall have been left with him, or at his last place of abode, in the same manner as he might before the passing of the act have proceeded after such defendant had a copy of the bill, &c., delivered to him, or left at his house or last place of abode.||

It was moved for a sequestration *nisi*, for want of an answer, against a menial servant of a peer of the realm, as the first process for contempt, in the same manner as in the case of the peer himself; and though the motion was granted by the Master of the Rolls, yet the registrar refused to draw it up, as thinking it against the course of the court; which being moved again before the Lord Chancellor, his lordship, upon reading the statute 12 & 13 W. 3, c. 13, likewise granted the motion, it appearing to be both within the meaning and words of the statute; and if it were not so, as it was plain no attachment would lie against their persons, consequently there would be no remedy against them, and they would have a greater privilege than their lord, if the process against such menial servant were to be a *subpoena*.

1 P. Wms. 535, pl. 155.

The plaintiff, in an action against a member of parliament, had proceeded agreeably to the act of 10 G. 3, c. 50, and had obtained rules for selling the issues levied upon a *distringas*, *alias*, and *pluries*; and also a rule for an attachment against the sheriff; but no issues had been actually levied, and at length defendant appeared; whereupon it was moved that these rules should all be discharged. For as no issues had been levied, they could not be *sold*; [vide § 3, of the statute 10 G. 3, c. 50;] and as

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the defendant in the action had now appeared, the end and purpose of the writs were answered. On the other side, the plaintiff insisted on the costs of issuing the writs, before the rules should be discharged. And the court thought that reasonable; and directed *that on payment of costs* the rules should be discharged. They were of opinion, that these costs were not to attend the event of the suit, but were to be paid to the plaintiff at all events, whether he should finally succeed in his suit or not.

Martin v. Townshend, 5 Burr. 2725.

In Trinity term, 18 Geo. 3, in the King's Bench, in the case of Gosling and wife against Lord Viscount Weymouth, the question was, whether a *peer* could be sued there by *bill of privilege*? And adjudged that he might. The case was this:—

The plaintiffs commenced an action against the Lord Weymouth *by bill of privilege*, to which he pleaded in abatement, that he ought to have been sued by *original writ*, and *not by bill of privilege*; and thereupon there was a *demurrer and joinder*. On the argument of which the court relied on the case of Say against Lord Byron in that court, a few years before, and awarded a *respondeas ouster*.

Cowp. 844.

In the case of Say v. Lord Byron, Mr. L. Robinson moved (upon an affidavit, that the plaintiff had sued out two writs of *distringas*, whereupon the sheriff had levied forty shillings and four-pence, and that no bill was filed,) for a rule to show cause why the said two writs should not be quashed, and the money levied thereon be restored. He objected that a peer ought not to be sued by bill, but by original writ; and that the stat. of 12 & 13 W. 3, does not make any variation in the proceedings against peers, but respects, in this particular, *commoners* only. Mr. Stow showed cause, and the rule was enlarged. Upon showing cause at a farther day, the court declared, that there were many precedents of actions against peers of parliament for many years before the statute of W. 3, as certified by the Master, and the clerk of the rules; and said, why could not the court support its ancient jurisdiction as well as the Court of Exchequer, as *debitor domini regis*? The court therefore discharged the rule.

It is however very remarkable, that when the act of King William went to the lords for their concurrence to the proceedings therein, against the members of both Houses, *by bill and summons thereon*, the Lords expunged that part of the clause relating to themselves being sued by *original bill and summons*, and sent back the amended bill to the Commons; which afterwards passed accordingly. Which clearly proves, that the Lords, at that time, did not think themselves included therein.

Nor is it clear even at this day, notwithstanding the above cases, that they are included in the act. For upon a writ of error by the Earl of Lonsdale, to reverse judgment because he had been sued by bill, the two following questions were proposed to the judges by the House of Lords. 1st, Whether the Court of King's Bench hath any jurisdiction to hold plea in a personal action against a peer, or lord of parliament, who is neither in the custody of the marshal nor is an officer or minister of that court, without the king's original writ issuing out of his chancery, to warrant such action? 2d, If the court has no such jurisdiction, can it derive such jurisdiction from the acquiescence of the defendant, by pleading to issue in an action commenced without the king's original writ? In answer to which

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the Lord Chief Justice Eyre stated the unanimous opinion of the judges to be, that the first question would have admitted of considerable doubt, if the objection had been made in an earlier stage of the cause, and that the cases of Say v. Lord Byron, and Gosling v. Lord Weymouth, were not to be considered as decisive authorities upon the subject. But that after pleading in chief it was too late for the defendant to object to the jurisdiction of the court.

Earl of Lonsdale v. Littleddale, 2 H. Bl. 267, 299; ||and vide 3 Bos. & Pul. 7.||

||And if a peer be sued jointly with others by bill of Middlesex, the Court of K. B. will set aside proceedings as against the peer.

Briscoe v. Lord Egremont, 3 Maul. & S. 88.

But the Court of C. P. refused to set aside proceedings against an Irish peer sued by bill, and left him to plead his privilege in abatement. But where an Irish peer was sued by common *capias*, the Court of C. P. set aside the proceedings, although it appeared that the defendant had often waived his privilege, and had sued and been arrested as a commoner.

Davies v. Lord Rendlesham, 1 Moo. 410; 7 Taunt. 679; Fortnam v. Lord Rokeby, 4 Taunt. 662.

A declaration in case against an earl, stating him to have been *summoned* to answer, instead of *attached*, is bad.

Hunter v. Deloraine, 2 Chitt. R. 638.||

[A member of the House of Commons may be sued either in B. R. or C. B. by bill; but he cannot be declared against in B. R. as *in the custody of the marshal*.

2 Stra. 734; Say, R. 634.

All the subsequent proceedings to the declaration against a *peer or privileged person* are the same as in other cases, except that their bodies cannot be taken *in execution*, unless the judgment is obtained upon a *statute-staple* or *statute-merchant* or upon the *statute of Acton Burnell*, 11 Edw. 1, and then a *capias ad satisfaciendum* lies even against peers of the realm.]

||And for preventing inconvenience, from merchants and other persons within the description of the statutes relating to bankrupts being entitled to privilege of parliament and becoming insolvent, it is enacted, by 4 Geo. 3, c. 33, that any single creditor, or two or more creditors being partners, whose debt or debts amount to 100*l.* or upwards, and any two creditors whose debts amount to 150*l.* or upwards, or any three or more creditors whose debts amount to 200*l.* or upwards, of any person deemed a merchant, banker, broker, factor, scrivener, or trader within the description of the acts of parliament relating to bankrupts, having privilege of parliament, may upon affidavit made and filed of record in any of his majesty's courts at Westminster by such creditor or creditors that such debt is justly due, and that such debtor is a merchant, &c., within the description of the statutes concerning bankrupts, sue out of the same court a summons, or an original bill and summons, against such merchant, &c., and serve him with a copy thereof; and if such merchant, &c., shall not within two months after personal service of such summons (affidavits of the debt or debts having been duly made and filed as aforesaid) pay, secure or compound for such debt to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties, as any judge of the court shall approve, to pay such sum as shall be recovered in such action with such costs as shall be given in the same, he shall be accounted and

Prohibition.

adjudged a bankrupt from the service of such summons, and any creditor may sue out a commission against such person, and proceed thereon as against other bankrupts.

A bond given under the above statute is analogous to a recognisance of bail in error; and therefore, where a member had given such a bond with two sureties, conditioned for payment of the sum to be recovered in the action, and before trial became bankrupt, the court refused to order the bond to be delivered up to be cancelled.

Hunter v. Campbell, 3 Barn. & A. 273; 1 Chit. R. 731; and see *Jameson v. Campbell*, 5 Barn. & A. 250.

And in order to give effect to the above provisions, it is enacted by statute 45 Geo. 3, c. 124, that when any summons, or any original bill and summons, shall be sued out against any person deemed a merchant within the description of the acts relating to bankrupts, having privilege of parliament, and such affidavit of the debt duly made as in the said recited act mentioned, and such merchant shall enter into such bond as in the act mentioned, to pay such sum as shall be recovered in the action, together with such costs as shall be given in the same, every such merchant shall, within two months after personal service of such summons, cause an appearance to be entered to such action, and on default thereof shall be adjudged a bankrupt from the service of such summons, and any creditor may sue out a commission against such person, and proceed as against other bankrupts.

See Tidd, 115, (8th ed.)|| β For the acts of Congress relating to the privilege of ambassadors, public ministers, &c., see *Ambassadors and Courts of the United States*. γ

PROHIBITION.

As all external jurisdiction, whether ecclesiastical or civil, is derived from the crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown, that these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was (a) framed; which issues out of the superior courts of common law to restrain the inferior courts, whether such courts be temporal, ecclesiastical, maritime, military, &c., upon a suggestion that the cognisance of the matter belongs not to such courts; and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the judges that give it, are in such superior courts (b) punishable, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case.

2 Inst. 601; F. N. B. 40; 12 Co. 65; And. 279; 2 Jones, 213; Skin. 628. (a) And is of great antiquity, 3 E. 1. An attachment granted against the bishop and official, for holding plea after a prohibition. 2 Roll. Abr. 281. (b) Ecclesiastical courts holding plea by fraud of matters of which they had not cognisance, were punishable in the Star-Chamber. Dav. 52.

The object of prohibitions in general is, the preservation of the right

(A) What Courts may grant a Prohibition.

of the king's crown and courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law, to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every court; for by the same reason that one court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice.

Show. Par. Ca. 63.

So that prohibitions do not import that the ecclesiastical or other inferior temporal courts are *alia* than the king's courts, but signify that the cause is drawn *ad aliud examen* than it ought to be; and therefore it is always said in all prohibitions (be the court ecclesiastical or temporal to which they are awarded) that the cause is drawn *ad aliud examen contra coronam et dignitatem regiam*.

2 Inst. 602; Roll. R. 252; 3 Bulst. 120; Palm. 297.

Under this head we shall consider:

- (A) What Courts may grant a Prohibition.
- (B) Whether the granting of a Prohibition be discretionary, or *ex debito justitiæ*.
- (C) Who have a Right to such Writ, and may demand it.
- (D) Who may join in such Writ.
- (E) Of the Suggestion and Manner of obtaining a Prohibition; || and herein, of Costs.||
- (F) When to be granted absolutely, or *quousque* only; and therein, of directing the Party to declare on his Prohibition.
- (G) Whether more than one such Writ is to be awarded.
- (H) At what Time to be granted; and therein, in what Cases it may be granted after Sentence.
- (I) To what Courts a Prohibition may be awarded; and therein, that the superior Courts are to determine the Boundaries of all inferior Jurisdictions.
- (K) Prohibitions to inferior Temporal Courts in what Instances to be granted.
- (L) Prohibitions to the Spiritual Court in what Instances; And herein,
 1. *Where they meddle with a Matter purely Temporal.*
 2. *Where they determine on a Matter of Freehold.*
 3. *In what Cases a Prohibition lies when they determine on Criminal Offences.*
 4. *Where the Ecclesiastical Courts determine on acts of Parliament.*
 5. *In what Cases they have a concurrent Jurisdiction, and may determine Incidents.*
- (M) The Offence of disobeying a Prohibition.

(A) What Courts may grant a Prohibition.

THE superior courts of Westminster, having a superintendency over all inferior courts, may in all cases of innovation, &c., award a prohibition.

In this the power of the Court of B. R. has never been doubted, being the superior common law court in the kingdom.

F. N. B. 53; 4 Inst. 71.

Also, the Court of Chancery may award a prohibition, which may issue (a)

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as well in vacation as in term time; but such writ is returnable into B. R. or C. B. (b)

Bro. *Prohibition*, pl. 6; 4 Inst. 81; 1 P. Wms. 43. (a) If one be sued in an inferior court for a matter out of its jurisdiction, the defendant may either have a prohibition from one of the common law courts of Westminster-hall; or, in regard this may happen in a vacation, when only the Chancery is open, he may move that court for a prohibition; but then it must appear by oath made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused. And if a prohibition has been granted out of Chancery *improvidè*, and without these circumstances attending it, the court will grant a *supersedeas* thereto. 1 P. Wms. 476, pl. 135. || (b) The writ of prohibition from the Court of Chancery appears not to be returnable; but if it be not obeyed, then that court grants an attachment returnable in B. R. or C. B. 4 Inst. 81. ||

As the jurisdiction of the Court of C. B. is founded on original writs issuing out of Chancery, it hath been heretofore (a) doubted, whether this court could without writ or plea depending award a prohibition; but this point has been (b) determined by the unanimous sense of all the judges, viz.: That this court may upon a suggestion grant prohibitions, to keep as well temporal as ecclesiastical courts within their bounds and jurisdictions, and that without any original writ or plea depending; the common law being, in these cases, a prohibition of itself, and standing instead of an original.

(a) Bro. *Prohibition*, pl. 6; Noy, 153. (b) 12 Co. 58, 108; Bro. *Consultation*, pl. 3; 4 Inst. 99; 2 Brownl. 17.—Prohibitions for encroaching jurisdictions issue as well out of the C. B. as B. R. Vaugh. 157, *per* Vaughan, C. J. [The author of the Commentaries says, that the writ of prohibition is issuing properly only out of the Court of King's Bench, being the king's prerogative writ, but that for the furtherance of justice it may now also be had in *some* cases out of the Court of Chancery, Common Pleas, and Exchequer. 3 Black. Comm. 112. And Lord Hardwicke is reported to have said, that where the ecclesiastical court proceeds to try a custom by a different evidence from that which the common law courts would have done, *no other court* has the cognisance of it, but the Court of King's Bench. 3 Atk. 628, *Rotheram v. Fanshaw*. In the case of the Company of Horners in London, it is said that it is the *proper* power and honour of the Court of King's Bench to limit the jurisdictions of all other courts. 2 Roll. R. 471.]

Accordingly it hath been adjudged, that a prohibition ought to be granted by the Court of C. B. to the Court of Delegates, for suing there to avoid an institution of a clerk to a church in Lancashire, after induction made of him thereto, though the *quare impedit* for this church could not be brought in C. B. but only in the county of Lancaster; because the title of the advowson was not questioned by this prohibition, but the intrusion upon the common law, of which this court has special care.

Moor, 861; 2 Roll. Abr. 317, *Hutton's case*; Hob. 15 S. C.; and there said by Hob. that the party might likewise have a prohibition out of the Duchy Court.

But as to the Courts of B. R. and C. B. this difference hath been made, that in the first of those courts a prohibition may be awarded upon a bare surmise, (c) without any suggestion on record; and such writ is only in nature of a commission prohibitory, which is discontinued (d) by the demise of the king; but that as to a prohibition issuing out of C. B. the suggestion must be on record, and therefore is considered as the suit of the party, in which he may be nonsuited, and is not discontinued by the demise of the king.

Noy, 77; *Dixy v. Brown*, Palm. 422; Latch. 114, S. C. (c) That if it be insisted on, a prohibition cannot be moved for till the suggestion be entered on the roll. Salk. 136, *per* Holt, C. J. [For want of a suggestion on record the Court of B. R. discharged the rule to show cause why a prohibition should not be granted. *Hawkins, Assignee of Woolldridge v. Blaquièr* and others, Assignees of Sampson, Hil. 20 G. 3, 2 Crompt.

(B) Whether the Granting of a Prohibition be discretionary.

Pr. 239.] (d) But if an attachment issues upon such prohibition, or the party puts in bail, then it becomes a private suit, not discontinued by the demise of the king; and after such proceeding the party may be nonsuited, though not before. Palm. 423; Latch. 114, *per* Dodderidge and Jones.

Where the matter suggested for a prohibition appears on the face of the proceedings, an affidavit of the truth of the suggestion is not necessary. But where it does not so appear, it is essential that the suggestion should be verified by affidavit.

State v. Hudnall, 2 Nott & M.C. 419.g

If the king's farmer or a copyholder of the king's manor, be sued in the ecclesiastical court for tithes, upon a suggestion in the Court of Exchequer that he prescribes to pay a certain *modus* in lieu of tithes, he shall have a prohibition out of the said court, and such *modus* shall be tried there.

Palm. 525; Lane, 39; Roll. Abr. 539.

The grand sessions of North Wales may send a prohibition and writ to the spiritual courts there, as well as the courts here may.

Sid. 92; but for this vide Cro. Car. 341; Jon. 330; Vaugh. 411.

The Court of C. B. have no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see, at least at the instance of an uninterested stranger; and it is doubtful whether any of the courts can grant such a writ.

Jefferson v. Bishop of Durham, 1 Bos. & P. 105.||

The Supreme Court of the United States has power to issue a writ of prohibition to a District Court, when proceeding as a court of admiralty and maritime jurisdiction.

Act of Sept. 24, 1789, sect. 13, 1 Story, 59; United States v. Peters, 3 Dallas, 121.

But cannot grant an injunction to stay proceedings in a state court.

Act of 2d March, 1793, 1 Story, 311; Diggs v. Wolcott, 4 Cranch, 179.

Nor can a state court enjoin a judgment in a Circuit Court of the United States.

M'Keen v. Voorhees, 7 Cranch, 279.

No prohibition lies to restrain the proceedings of a court-martial as long as it acts within its jurisdiction.

State v. Wakeley, 2 Nott & M.Cord, 410.

In Kentucky, wherever the Circuit Court possesses jurisdiction over the subject-matter they have a right to issue writs of prohibition against courts of inferior jurisdiction.

Reese v. Lawless, 4 Bibb, 394.

A writ of prohibition will not be granted to prohibit a court of quarter sessions from granting a new trial after final judgment has been entered.

State v. Price, 3 Halst. 358.g

(B) Whether the granting of a Prohibition be discretionary, or *ex debito justitiæ*.

It is laid down in Hob. that though a surmise be a matter of fact, and triable by a jury, yet it is in the discretion of the court to deny a prohibition, when it appears to them that the surmise is not true.

Hob. 67, in the case of Aston Parish v. Castle Birmidge Chapel.

This authority has been often quoted in questions of this kind, and in some cases denied to be law. But yet it seems the better opinion, and to have been so holden by the greater number of our judges, that the award-

(C) Who have a Right to such Writ, and may demand it.

ing of a prohibition is a matter discretionary, that is, that from the circumstances of the case the superior courts are at liberty to exercise a legal discretion herein, but not an arbitrary one, in refusing prohibitions, where in such like cases they have been granted, or where by the laws and statutes of the realm they ought to be granted.

Winch. 78, it is said to be a matter discretionary.—But in Raym. 3, 4, Sid. 55, prohibitions are said by the judges to be *ex debito justitiæ* and *de gratiâ*. In Raym. 92, Hide, C. J., affirms, that a prohibition is *ex gratiâ*, but Keeling and Twisden positively denied it.—Salk. 33, pl. 6; Comb. 148, they are held to be discretionary.—Ld. Raym. 220, 578, it is said by Holt, C. J., that Hale and Windham held prohibitions to be discretionary in all cases.—And of this opinion is Holt; and so in Ld. Raym. 586.

It hath been determined in the House of Lords, that no writ of error will lie upon the refusal of a prohibition; but when a consultation is awarded, it is with an *ideo consideratum est*, and then a writ of error will lie.(a)

Ld. Raym. 545, in the Bishop of St. David's case. [(a) But error does not lie from the K. B. to the Exchequer Chamber; for prohibitions are not within the 27 Eliz. c. 28, 5 Barn. & C. 765.]

β An order granting a writ of prohibition is but the commencement of a proceeding from which a writ of error does not lie.

Lawless v. Reese, 3 Bibb, 479.γ

If a master of a ship sues in the Admiralty for his wages, and a prohibition is moved for, upon a suggestion that the contract was made on land, and the court is of opinion that a prohibition ought by law to be granted; in this case they will not compel the party to find (b) special bail to the action in the court above.

Salk. 33, pl. 4; Carth. 518; Com. 74; Ld. Raym. 576, S. C. [Clay v. Snelgrave, 3 Term R., K. B. 315.] (b) But Holt, C. J., confessed that the court had sometimes interposed and procured bail to be given, but that was by consent. Ld. Raym. 578. [For without consent it cannot be done, and the case of Wharton v. Pitts, Salk. 548, where such terms were imposed, was overruled in Velthasen v. Ormsley, 3 Term R., K. B. 315.]

If there is judgment against a simonist, who by the assent of parties is to continue for a certain time on the benefice, and who at the expiration of the time refuses to remove, but commits waste on the house or glebe, a prohibition to stay his doing waste may be had by the patron, incumbent, or any other person, because that is the king's writ; and any one may pray a prohibition for the king, and it is grantable *ex debito justitiæ*, and not in the discretion of the court.

Comp. Incumb. 43; Sid. 65.

β A writ of prohibition will not be granted where the subject-matter is within the jurisdiction of the subordinate tribunal; if error intervenes, the remedy is by *certiorari*.

The People, ex rel. Karr v. Seward, 7 Wend. 518.γ

(C) Who have a Right to such Writ, and may demand it.

THE king may sue for a prohibition, though the plea in the spiritual court be between two common persons, because the suit is in derogation of his crown and dignity.

F. N. B. 40.

So, if the ecclesiastical court will hold plea of any matter which belongs not to their jurisdiction, upon information thereof to the king's courts,

(D) Who may join in such Writ.

either by the plaintiff, defendant, or by a mere stranger, a prohibition will issue.

2 Inst. 607.

As, if a man libels in the spiritual court for a matter which does not appertain to that court, but to the common law, as a matter of frank-tene-ment; yet he himself, against his own suit, may pray a prohibition, and shall have it.

2 Roll. Abr. 312; Leon. 130; Gouls. 149.

So, where the plaintiff in the spiritual court brought a prohibition to stay his own suit there, for that he suing for tithes by virtue of a lease made by the vicar of A for three years, the defendant claimed to be discharged of the tithes by a former lease and composition by deed; it was held, that the plaintiff himself may have a prohibition to stay the suit; for the ecclesiastical judges are not to meddle with the trial of leases or real contracts, though they have jurisdiction of the original cause (viz., the tithes); for the lease is in the realty, and is not merely accidental. And it makes no difference, that the plaintiff bring this prohibition to stay his own suit; for if the temporal court has knowledge by any means that the spiritual court meddles with temporal trials, a prohibition ought to be awarded.

Cro. Jac. 351; 2 Bulst. 283; Lit. R. 20, Wort v. Clifton.

If a vicar sues a parishioner for tithes in the spiritual court, and the parson appropriate appears there (a) *pro interesse suo*, and prays a prohibition, it shall be granted.

2 Roll. Abr. 312, Robert's case. (a) Cro. Eliz. 251; Keilw. 110.

If lessee for years is sued in the spiritual court for tithes, he in reversion may have a prohibition.

Moor, 915; Cro. Eliz. 55.

But no man is entitled to a prohibition, unless he is in danger of being injured by some suit actually depending; and therefore upon a petition to the archbishop, or other ecclesiastical judge, no prohibition lies.

March, 22, 45.—A prohibition *quia timet* does not lie. Allen, 56.

|| A stranger cannot have an original writ of prohibition against a bishop to restrain him from committing waste in the possession of his see.

1 Bos. & P. 105.||

[If the wife libel in the spiritual court to recover her fame, a prohibition shall not be granted upon the motion of her husband.

Tarrant v. Mawr, 1 Stra. 576.]

§ Writs of prohibition may be issued either at the instance of the plaintiff or defendant.

Reese v. Lawless, 4 Bibb, 394.⁹

(D) Who may join in such Writ.

If several libels are exhibited against A and B in a matter in which the court hath not conusance, A and B cannot join in a prohibition. So, if the griefs be several, as some books say.

Noy, 131; Leon. 286; Cro. Car. 162.

But, where the vicar of A libelled several persons severally for tithes, who joined in a prohibition, suggesting a *modus*; though the court held

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in this case, that the prohibition was not regularly brought, being in all their names, when there were several libels; yet inasmuch as this was on a custom, and matter triable at common law, in which the ecclesiastical court was properly prohibited, though not in exact form, they refused to award a consultation, but directed that the parties should put in several declarations, as if there had been several prohibitions.

Yelv. 128, 129; Burgess and Dixon v. Ashton; Owen, 13, Bartue's case, L. P. adjudged.

So, if A libels against B and C for defamation, and they sue a prohibition, they shall join in attachment upon it; and it is no objection to say that the defamation was several.

Ld. Raym. 127, *per* Treby, C. J.; and vide for this, Vent. 266; Raym. 425; Comb. 448.

Where two or more are allowed to join in a prohibition, and one of them dies, the writ shall not abate; because nothing is by them to be recovered, but they are only to be discharged.

Owen, 13, *per cur.*

(E) Of the Suggestion and Manner of obtaining a Prohibition: ¶and herein, of Costs.¶

WHERE the matter suggested for a prohibition appears upon the face of the libel, an affidavit is never insisted upon; but if it does not appear upon the face of the libel, or, if a prohibition is moved for as to more than appears upon the face of the libel to be out of their jurisdiction, there ought to be an affidavit of the truth of the suggestion.

2 Salk. 549, pl. 8, *per* Holt, C. J.; 1 P. Wms. 677; [4 Burr. 2037; Cowp. 330.] *State v. Hudnall*, 2 Nott & M.C. 419. For the form of a suggestion and writ of prohibition, see *United States v. Peters*, 3 Dallas, 121.

The suggestion in the temporal courts may be traversed.

2 Inst. 611; 2 Co. 44. Prohibition not to be granted upon process before libel or appearance. Salk. 35, pl. 8.—Where it is in nature of a *supersedeas*. Lev. 253.—That a person may alter his suggestion. Show. 179.—Where a variance between the libel and suggestion is not material. Yelv. 79.

On a rule to show cause why a prohibition should not be granted to stay a suit against the plaintiff in the court of the archdeacon of Litchfield, for not going to his parish church, nor any other church, on Sundays or holidays, nor receiving the sacrament thrice a year, upon suggestion of the statute Eliz. and toleration act, and then qualifying himself within the act, and alleging that he pleaded it below, and they refused to receive his plea; cause was shown that this fact, that such a plea had been put in and refused, was false, and that the plaintiff was not a dissenter, nor had qualified himself *ut suprà*, and therefore hoped the court would not suffer the rule to stand, unless there was an affidavit of the above fact; for by that means any person might come and suggest a false fact, and oust the spiritual court of their jurisdiction, which the court admitted; and therefore for want of such affidavit the rule was discharged.

2 Ld. Raym. 1211, *Burdett v. Newell*.

If a plea to an inferior jurisdiction be properly tendered, and they refuse it, though this be a good cause for a prohibition, yet an affidavit must be made of the refusal.

Skin. 20, pl. 20; Hard. 406; 3 Keb. 217.

¶The matter of the plea tendered to the inferior court must not appear bad on the face of it. Where to a suit for tithe of turkeys a *modus* was

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pleaded in the spiritual court, that the vicar was only entitled to one penny for every turkey laying eggs, or to every tenth egg laid by such turkey, and this plea was rejected, and a prohibition was applied for on the ground of such rejection, the Court of B. R. refused the prohibition on the ground of the uncertainty of the *modus* in not ascertaining any time for the money payment, in case the option were made to take the tithe in money.

Roberts v. Williams, 12 East, 33.¶

A motion was made for a prohibition to the ecclesiastical court of London, for calling a woman a *whore*, upon a suggestion that the words were actionable there by custom of the place; but the court would not grant a prohibition without oath made, that if any such words were spoken, they were spoken in London, and not elsewhere.

4 Mod. 367; [1 Stra. 187; 4 Burr. 2032, 2039. See Dougl. 380, as to this custom of London.]

On a libel for calling the plaintiff *old thief and old whore*; the defendant suggested for a prohibition, that if any such words were spoken, they were spoken at the same time; but this suggestion was held ill, because the words ought to have been fully confessed.

Vent. 10, Day v. Pitts.

By 2 & 3 Edw. 6, c. 13, § 14, it is enacted, "That if any party at any time hereafter, for any matter or cause before (a) rehearsed, limited, or appointed by this act, to be sued or determined in the king's ecclesiastical court, or before the ecclesiastical judge, do sue for any prohibition to any of the king's courts where prohibitions before this time have been used to be granted, that then in every such case the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same court, where such party demanded prohibition, the *very true copy of the libel, depending in the ecclesiastical court* concerning the matter wherefore the party demandeth prohibition, subscribed or marked with the hand of the same party, and under the copy of the said libel shall be written the suggestion wherefore the party so demandeth the said prohibition; and in case the said suggestion, by two honest and sufficient witnesses at the least, be not proved true in the court where the said prohibition shall be so granted, within six months (b) next following after the said prohibition shall be so granted and awarded, that then the party, that is letted or hindered of his or their suit in the ecclesiastical court by such prohibition, shall upon his or their request and suit, without delay, have a consultation granted in the same cause in the court where the said prohibition was granted, and shall recover double costs and damages against the party that so pursued the said prohibition; the said costs and damages to be assigned or assessed by the court where the said consultation shall be so granted; for which costs and damages the party to whom they shall be awarded may have an action of debt by bill, plaint or information, in any of the king's courts of record."

(a) Rehearsed in the statutes, 27 H. 8, c. 20, and 32 H. 8, c. 7, to which this act refers. ¶(b) 1 Turn. & Russ. R. 314.¶

In the construction of the above-mentioned statute the following opinions have been holden.

That this statute referring to the statutes 27 H. 8, c. 20, and 32 H. 8, c. 7, which extend to tithes and offerings generally, all such tithes and

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church-duties as are mentioned in those statutes are as much within this act as if particularly enumerated.

2 Inst. 662; Comp. Incumb. 600; Dyer, 170 b.

And therefore it extends to prohibitions to suits for small tithes as well as great.

Yelv. 102; 2 Ld. Raym. 1172.

So it hath been adjudged, that the suggestion of a *modus decimandi* ought to be proved within six months, being within the act.

Noy, 148; Yelv. 102, L. P.

So, where one that was sued for tithe of hay in the spiritual court, suggested for a prohibition, that he was to pay so much upon an arbitrament; it was held, that this suggestion ought to be proved, as well as one made of a *modus decimandi*. So, on a suggestion upon the statute 31 H. 8, c. 13, that lands are tithe-free, because the clause requiring the proof of a suggestion is general, and not limited to real composition.

Roll. R. 55, Reynolds v. Hay.

So, upon a suggestion, that the suit in the spiritual court was for tithes of heath and barren ground improved, within seven years after the improvement, contrary to the statute; in this case, proof of the suggestion within six months was held necessary.

Jon. 231, Strande v. Hoskins; Cro. Car. 208.

But it hath been held, that there needs no proof of the suggestion, where the suit is for tithes contrary to common right, or where the contract (a) of the party is suggested.

(a) For this vide Yelv. 102, 119; 2 Leon. 29; Brown. and Gouls. 99; Hetl. 145; 2 Keb. 134; Lit. R. 297.

It hath been held, that the suggestion need not be proved (b) strictly, nor with precise certainty as to all its circumstances; but that if it be proved in substance, or in such manner as to show (c) that the ecclesiastical court has not jurisdiction, it is sufficient.

Cro. Eliz. 736, 819; Ca. temp. Hardw. 292; Moor, 911. (b) That proof by hearsay is sufficient. Palm. 377.—Or that it is so by common fame. Noy, 28. (c) As, where a *modus* was alleged to be, that one should pay 20s. in satisfaction of tithes, and the proof was, that he should pay 40s., this was held sufficient proof; because thereby the court above had sufficient jurisdiction. Hetl. 100. So, where the suggestion was to pay 2s. 6d. for tithes, and the witnesses proved the *modus* to be to pay 3s., this was held good by two judges against one; because it ousted the ecclesiastical court of jurisdiction. Noy. 44; Hetl. 110; and vide Yelv. 55; 2 Keb. 57, 407.—So, if one surmise that the inhabitants of B (of which he himself is one) have paid a *modus*, and the proof be that he himself had paid it, this is sufficient; because it ousts the ecclesiastical court of its jurisdiction. Noy, 28.

The suggestion must be proved by honest and sufficient witnesses, which is required by the express words of the statute; and therefore the testimony of one attainted of felony, excommunicated or convicted of recusancy, is, as in other cases, to be rejected.

2 Bulst. 154.

But it hath been held, that persons, such as parishioners of the parish, &c., who may not be sufficient and able witnesses at a trial at law, may notwithstanding be sufficient witnesses to prove the suggestion; the chief intent of the statute being to prevent frivolous and vexatious suggestions. Also it hath been held, that after admitting and recording the proof of the

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suggestion, nothing is to be objected against the persons of the witnesses or their evidence.

Mich. 27 Car. 2, in *C. B.*, *Sharp v. Hobart*.

If a suggestion consists of two parts, it is said to be sufficient to produce one witness to the one, and another to the other.

Vent. 107.

It hath been held, that the six months for proof of the surmise shall be accounted according to the calendar; for that this being a computation which concerns the church, it is but reasonable that it should be done according to the computation used in the ecclesiastical law.

Hob. 179; Lit. R. 19; 2 Mod. 58; [2 Roll. Abr. 521; *Foy v. Lister*, 2 Salk. 554; 2 Ld. Raym. 1172, S. C., *semb.* Vide *contra*, and that this computation is confined only to the case of a lapse in *quare impedit*, Co. Lit. 135 b; Cro. Jac. 166, 167; 4 Mod. 186; 3 Burr. 1455; Skin. 314. And that depends on the words in the act of 13 E. 1, st. 1, c. 5, "*tempus semestre*." But in all acts where "months" are spoken of, without the word "calendar," and nothing is added from which a clear inference can be drawn that the legislature intended calendar months, it is understood to mean lunar months. *Lacon v. Hooper*, 6 Term R. 226.] In some of the courts, a "month" (mentioned generally) has been construed to mean a calendar month, and in others a lunar month. See *Brudenell v. Vaux*, 2 Dall. 302; *Commonwealth v. Chambre*, 4 Dall. 144; *Moor v. Houston*, 3 Serg. & R. 184; 3 Johns. Ch. R. 74; 1 Johns. Ch. 100; 7 Johns. 217; 15 Johns. 119; 4 Mass. 461; 4 Bibb, 105; Bouv. Law Dic. tit. *Month*; 1 Johns. Cas. 99; 1 Bing. 307; 8 Serg. & Low. 329; 1 Younge & Col. 401; 1 Coop. Ch. 383; Cooke Tenn. 67, 74; 10 Ohio, 496; 3 Halst. 232; 5 Conn. 357; 2 H. K. Marsh. 245; 2 Sim. Stu. 476.]

It is said in *Moor* (a) that the time of six months given by the statute to prove the suggestion, ought to be intended six months in term-time, and that the vacation should be no part of the time; but this hath been since adjudged otherwise, (b) and that the time shall commence from the *teste* of the writ of prohibition, and not from the time of the rule made for awarding it.

(a) *Moor*, 573. (b) *Noy*, 30; 2 Ld. Raym. 1172; 2 Salk. 354, pl. 20.

[When the declaration is ordered to be amended, the time for proving the suggestion is to be computed from the amendment.

Maltom v. Acklom, Barnes, 428.]

If the surmise (c) be proved before one of the judges within the six months, although it be not recorded till after the six months by the court, it is well enough.

Noy, 30. (c) That it must be entered in the office. 2 Show. 308, pl. 316.

It hath been held, that proof which is not sufficient may be supplied by better proof within the six months, but not after.

Lit. R. 155.

[It is said, if the party who has obtained a writ of prohibition, be ordered to declare in prohibition, that he is not obliged to make proof of his suggestion within six months, pursuant to the 2 & 3 Ed. 6, because the proof is, in such case, to be made at the trial of the cause.

Arg. Creake v. Pitcairn, Trin. 13 G. 2, Cas. Pr. C. B.]

The party, on failure of proof of the suggestion, shall not only have double costs and damages, but also his costs and damages (d) in the action he brings for the recovery of them.

Bendl. 143. (d) Vide stat. 8 & 9 W. 3, c. 11.

But, if the prohibition be grounded partly on a *modus*, which needs

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proof, and partly on the contract of the parties, which needs no proof, there ought not to be double costs; for the mixing of the contract with the manner of tithing privileges the whole.

Brownl. Gouls. 99; Yelv. 119.

So where, for a variance between the libel and suggestion, a consultation was awarded, and double costs adjudged to the defendant; this was held to be error by the very letter of the statute which gives double costs (a) only for want of proving the suggestion, and for no other cause.

Yelv. 79, 80. (a) Carth. 463.

So, where a prohibition was obtained upon a suggestion which was not proved within the six months, in which the defendant took issue with the plaintiff, which was found for the plaintiff; in this case it was resolved, that the defendant should not have double costs for want of the suggestion's being proved; for the statute is, that he shall have a consultation and double costs; but in this case he could not have a consultation, the matter and issue being found against him; but ought to have prayed a consultation upon the suggestion's not being proved, and then should have had his double costs.

Latch, 140, Watkinson v. Sir G. Pacy.

[Where a consultation is granted, because the suggestion has not been proved within six months, the court will not make the payment of the double costs and damages given in such case to the defendant, in prohibition of the 2 & 3 Edw. 6, c. 13, a part of the rule;—that would be unnecessary, for if a consultation be awarded for want of such proof, double costs and damages follow of course.

Foy v. Lister, 2 Ld. Raym. 1172.

A suit was instituted in an ecclesiastical court against an *administrator* for tithes *due from the intestate in his lifetime*, to which suit the administrator, alleging a *modus*, obtained a prohibition, but did not prove his suggestion within the time limited for that purpose by the 2 & 3 Edw. 6, c. 13, and it was doubted, whether or not he was liable to double costs according to that statute.

Creake v. Pitcairne, Trin. 13 & 14 G. 2, Barnes, 129; *sed vide* S. C. Cas. Pr. C. B. 157; Pract. Reg. 118. According to these books, the court resolved, that the plaintiff in prohibition was *not* liable to pay any costs.

If a defendant in prohibition bring an action of debt for the recovery of the double costs and damages, given by the 2 & 3 Edw. 6, where a consultation is granted for want of the suggestion's being proved within six months, he shall also have costs in such action.

1 Roll. Abr. 516, l. 37.

The 2 & 3 Edw. 6, c. 13, § 14, gives costs where the party applying for a prohibition fails in proving the truth of his suggestion within six months; and this continued to be the only case where either a plaintiff or defendant in prohibition was entitled to recover any costs until the 8 & 9 W. 3, c. 11. By the third section of that statute it is enacted, "That in all suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover

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his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit.*"

Comb. 20. The 5th sect. of 8 & 9 W. 3, c. 11, provides, that nothing in that act contained shall be construed to alter the laws then in being, relative to the payment of costs by executors or administrators.

Where judgment is given for the plaintiff, in a suit in prohibition, upon demurrer, or after plea pleaded, he shall have costs taxed from the suggestion, and so as to include the costs incurred by the motion.

2 Stra. 1062; Ca. temp. Hardw. 396; Andr. 62; Barnes, 130.

Thus in prohibition, a motion being made that the prothonotary should not allow costs, except from the time of the delivery of ne declaration, the court unanimously declared, that the plaintiff ought to have his costs from the time of the suggestion, and of the suggestion itself, and all costs incident and subsequent thereto.

Wills v. Turner, Hil. 2 G. 1, Cas. Pr. C. P. 11; S. C., B. N. P. 331.

So where, after judgment for the plaintiff in prohibition, the question was, Whether the costs payable by the defendant should be computed from the first motion, or only from the declaration? upon search, it was found to be the course of all the courts, to tax only from the time of declaring, except in two instances, viz., Eads v. Jackson, B. R. 2 G., and Brown v. Turner and others, in C. B., where costs were allowed from the time of the original motion for the prohibition. And Mr. Baron Fortesque said, that this question had been put to all the judges, whose opinions were conformable to these two decisions. Therefore, in the principal case, the Court of Exchequer ordered costs to be taxed from the first application to the court inclusively; and directed the officers to pursue that mode of taxation in all such cases for the future.

Sir Harry Houghton v. Starkey, in *Seacc.* Hil. 4 G. 1, 4 Stra. 82; S. C., Fort. 348; S. C. cited Ca. temp. Hardw. 396.

Afterwards, in Swetnam v. Archer, the same question occurred, and received the same determination; and, in this case, it was agreed that the practice had been uniformly such, since the resolution in Houghton v. Starkey.

1 Stra. *ubi sup.*; *sed vide* Ca. temp. Hardw. 396, where this case is cited differently, and said to have been never determined.

And this point was again agitated in a subsequent case, on account of a doubt entertained on the subject by a new Master of the King's Bench; when the court resolved, that the plaintiff in prohibition should have costs from the very first application for the prohibition, because the whole is but one suit, and the words of the 8 & 9 W. 3, c. 11, are, that the plaintiff shall recover his costs of suit.

Bury v. Cross, 1 Stra. 83; S. C., 1 Barnard. K. B. 47; S. C. cited Ca. temp. Hardw. 396.

But it hath been holden, that a defendant in prohibition, in case of the nonsuit of the plaintiff, is not entitled to the costs occasioned by opposing the rule for the prohibition, but merely to the costs of the nonsuit.

Thus, upon a rule to show cause why the prothonotary should not review his taxation of costs, it appeared, that the plaintiff in a suit in prohibition had been nonsuited; upon which the question was, Whether the defendant ought to have the costs incurred by opposing the rule to show cause why the writ of prohibition should not be granted, as well as the

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costs of the nonsuit? It was determined, that he ought to have no more than the costs of the nonsuit. If the defendant had succeeded in his opposition to the rule to show cause why the prohibition should not be granted, it would even then have been for the consideration of the court, whether, upon all the circumstances of the case, that rule should be discharged with costs; but as he did not succeed in that opposition, it must now be intended that it was groundless, and, consequently, there is no pretence for his being allowed the costs thereof.

Carlisle v. Meyrick, C. B. Hil. 17 G. 3, Say. on Costs, 137.

If, upon argument of a demurrer to a declaration in prohibition, a writ of prohibition be awarded as to some of the points contained in the libel in the court below, and a consultation as to others, the plaintiff in prohibition shall have costs.

Thus, where John Middleton and his wife were libelled against in the spiritual court, for being married out of canonical hours, without license or banns, and in a private house; a prohibition was applied for, upon a suggestion that the power of the ecclesiastical court was taken away by the statute of 7 & 8 W. 3, c. 35, by which penalties were laid on the clergyman marrying, and the parties married, without banns or license, which penalties were to be recovered in the temporal court. In order to bring the matter fully before the court, the plaintiffs were ordered to declare in prohibition; the defendant by his plea denied (in common form) that he had proceeded in the spiritual court contrary to the writ of prohibition; and for a consultation demurred generally. After joinder in demurrer by the plaintiffs, John Middleton, the husband, died; however, notwithstanding his death, the court, at the instance of the parties, and because the ecclesiastical court might still proceed against the wife, gave judgment that the prohibition should stand as to that part of the libel which was for marrying at an uncanonical hour, *i. e.* not between the hours of eight and twelve in the forenoon, and that a consultation should be awarded *quoad* the residue of the cause.

Middleton v. Croft, Ca. temp. Hardw. 395; S. C., Andr. 57; 2 Stra. 1062.

In consequence of this judgment, application was made to the court that the Master might be directed to tax Anne Middleton, the wife, her costs, upon the 8 & 9 W. 3; but no suggestion being then made upon the roll, of the husband's death, the court refused, at that time, to grant any rule.

This suggestion being afterwards made, the matter was moved again, and a rule to show cause was granted.

For the plaintiff, the case of *Dr. Bentley and the Bishop of Ely* was cited; where, in a suit in prohibition in this court, judgment was given that the prohibition should stand as to all the articles, concerning which the doctor was libelled below; but, upon a writ of error in the House of Lords, that judgment was reversed, and a new judgment given,—That the prohibition should stand as to part of the articles, and a consultation go as to the rest; and there it came to be debated, whether the plaintiff in prohibition was entitled to costs, he having judgment only for part? and this was solemnly argued, upon a day appointed for that purpose, by all the judges then present; and finally the plaintiff had judgment thereupon for his costs.

Vide 4 Bro. Parl. Cas. 66.

Upon the first argument of the principal case, the whole court were

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clearly of opinion, that where a prohibition goes to part, and a consultation to other part, the plaintiff in prohibition is entitled to costs. And Lord Hardwicke, then Chief Justice of this court, observed, that this case was within the very words of the statute of 8 & 9 W. 3, c. 11, § 3, which are, *if the plaintiff obtain judgment, or any award of execution after plea pleaded, or demurrer joined*; and the statute only provided for the defendant's recovering his costs in such suits where the plaintiff should become nonsuit, suffer a discontinuance, or a verdict should pass against him; neither of which was the case here. And as to the *quantum* of the costs, he said, that though it was an equitable construction of the statute, to give costs from the first motion; yet where a consultation was awarded as to part, it was in the discretion of the court, upon the circumstances of the case, whether they would allow costs for that time or not.

Hil. Term, 10 G. 2.

However, it being objected, that the death of the husband before judgment had abated the suit, no rule was then made for costs, but the court ordered this point to stand over for further argument.

Accordingly, this question was argued in a subsequent term, when the court were unanimously of opinion, that in this case the circumstance of the husband's death, previous to the judgment, was not an abatement of the suit, even at the common law; or, if it was, that it was clearly aided by the 8 & 9 W. 3, c. 11, § 7. And thereupon they made the rule for the allowance of costs to the wife absolute; and added, that such costs must be allowed from the time of the original motion for the prohibition.

Andr. 62.

So it hath been determined, that a defendant in a suit in prohibition is entitled to costs, where a verdict is found for him, though it be for part only of the matter in issue, and a consultation be awarded for the residue.

Malton v. Acklam, Barnes, 138.

||But in a very recent case, where the judgment on demurrer to a declaration in prohibition was, that a writ of prohibition issue as to proceeding on part of the matters in the libel, with a view to deprivation, and a writ of consultation as to proceeding on them for any other purpose, and as to all other matters in the libel, it was held, that this was not a case within the statute as to costs.

Free v. Burgoyne, 5 Barn. & C. 538.||

If, in a suit in prohibition, the plaintiff be obliged to declare as administrator, (as if the prohibition be granted to a suit in the spiritual court against the plaintiff as administrator, for tithes due in the intestate's lifetime,) and become nonsuit at the trial, he is not liable to the payment of costs.

Creek v. Pitcairne, Cas. Pr. C. P. 157; Pract. Reg. 118.

A plaintiff in prohibition is entitled to costs, by the statute of 8 & 9 W. 3, c. 11, only where he obtains judgment after plea pleaded, or demurrer joined; but, if there be judgment by default in a suit in prohibition, and the plaintiff have damages upon a writ of inquiry for the contempt in proceeding after the writ of prohibition delivered, he will be entitled to costs, by virtue of the statute of Gloucester, c. 1: this was determined in the following case.

Upon a motion to set aside a writ of inquiry of damages in prohibition, after judgment by default, upon which the jury had found damages for the

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plaintiff, it was alleged on the part of the plaintiff, that the citing him to appear in the spiritual court in a plea of which that court has no cognisance, and whereby the plaintiff may sustain great damage, is a contempt of the laws of the land, and therefore the defendant ought to make the plaintiff satisfaction for the damages sustained by the proceedings in the court below; and this the defendant tacitly admits, by suffering judgment to go against him by default. And if the plaintiff be entitled to damages, he is also to costs, under the statute of Gloucester.

Sir E. Bettinson v. Dr. Hinchman, Cas. Pr. C. P. 20; S. C., B. N. P. 331; Lill. Ent. 320; Acc. Raym. 387; 2 Jon. 128; 1 Vent. 337, 348, 350; 3 Lev. 360.

The court inclined to be of this opinion, but took further time to consider of the matter. On a subsequent day, the question was solemnly argued; after which the court gave the plaintiff leave to proceed on his inquiry, and directed the prothonotary to tax his costs. But because, in this case, the defendant was prosecuted for a contempt at common law, as judge of the spiritual court, and he could not possibly be in contempt until the rule was made absolute to stay his proceedings, the costs were allowed only from the time that the rule for the prohibition was made absolute.

It should seem that the case reported by the name of Sir Edward Bettinson v. Savage, in Com. 335, is the same with that above stated; though it must be confessed the reports differ very widely in several material points.

Hull. on Costs, 322.

According to Comyns, the plaintiff having declared in prohibition, the defendant, *quoad* any proceedings since the writ of prohibition delivered, pleaded not guilty, and for a consultation demurred: there was judgment for the plaintiff upon the demurrer, and upon a writ of inquiry of damages in that issue, the jury found 2*d.* damages. And the court were of opinion, the plaintiff should have costs; and, upon error in the King's Bench, this judgment was affirmed. And afterwards, the reporter adds, a writ of error was brought in parliament, which was dropped upon his persuasion that it was reasonable, and agreeable to the authorities in law, that the plaintiff should have costs.

If one of the issues joined upon a declaration in prohibition be, whether the defendant hath proceeded in the spiritual court subsequent to the granting of a writ of prohibition, and, at the trial, it be found against the defendant; or if, in an attachment upon a prohibition, it be found that the party proceeded after the writ of prohibition awarded; the plaintiff, in both cases, is entitled to recover damages and costs for the contempt.

Facy v. Lange, Cro. Car. 559; S. C. 1 Roll. Abr. 516, 575. Jon. 447; Vide 1 Stra. 485; 8 Mod. 1.

If defendant in prohibition compels the plaintiff to declare, and then pleads a nugatory plea, the court will, on motion, order him to pay costs to the plaintiff.

Thus, at the defendant's instance, it was made part of the rule for a writ of prohibition, that the plaintiff should declare in prohibition. The defendant afterwards demanded a declaration, and threatened a *nonpros* for want thereof. Whereupon the plaintiff's agent prepared a declaration; but when it was ready, he was told by the defendant's agent that he need not deliver it; however, having been at the trouble and expense of preparing it, he delivered the same, and demanded a plea. Defendant

(F) When to be granted absolutely, or *quousque* only.

pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, gave a rule to reply, and demanded a replication. Upon which the plaintiff obtained a rule for the defendant to show cause why he should not pay the plaintiff the costs of the proceedings in prohibition. The rule was now made absolute. The court looked upon the plea to be a sham nugatory plea, not being to the merits of the cause; the allegation that the defendant has proceeded contrary to the prohibition, is, and must be put into every declaration of this kind; but whether he has so proceeded or not is totally immaterial. The statute 8 & 9 W. 3, c. 11, gives costs after plea pleaded, or demurrer, but this is not a plea within that statute.

Seed v. Wolfenden, Barnes, 148.

But though a plaintiff in prohibition may have prepared, and actually tendered a declaration to defendant, proceedings shall be stayed without costs, where the defendant is desirous of submitting without further litigation.

Thus, upon showing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay proceedings, as being willing to submit. The plaintiff insisted he had a right to go on, in order to get at the costs of the motion, which he could not otherwise have. But the court stayed the proceedings *without* costs; saying, the direction to declare was in favour of the defendant, who might waive it.

Gegge v. Jones, 2 Stra. 1149.]

The surmise or suggestion may be brought in by attorney, and need not be in proper person.

Leon. 286.

A prohibition is not to be granted the last day of term, but on motion on that day a rule may be obtained to stay proceedings till the ensuing term.

Latch, 7; 2 Roll. R. 456. [Rolle adds, "or on the last day but one." Gibs. 1029; 3 Burn's Eccl. Law, 213.]

(F) When to be granted absolutely, or *quousque* only; and therein, of directing the Party to declare on his Prohibition.

PROHIBITIONS are granted either absolutely, or *hoc usque* only till such an act be done. The first of these is peremptory, and ties up the inferior jurisdiction till a consultation is awarded: the second is *ipso facto* discharged upon performing the act, and that, without any writ of consultation.

6 Mod. 308.

When a prohibition is moved for, because a copy of the libel is denied to be delivered, the court requires that oath should be made of the denial, and the prohibition is only *quousque* the copy is delivered.

Vent. 252; 2 Salk. 553, pl. 19.

A prohibition *quousque* they give copy of the libel, if it be granted before any libel exhibited, does not bind them from exhibiting any libel, and after they shall not proceed till they give a copy of it.

6 Mod. 308.

(F) When to be granted absolutely, or *quousque* only.

A prohibition was denied to be granted to the Admiralty court, upon a suggestion that they refused to give the party sued there a copy of the libel, because the statute (a) extends only to the ecclesiastical courts.

Ld. Raym. 442. (a) 2 H. 5, c. 3.

It was formerly held by all the judges of England, that when there was a proceeding *ex officio* in the ecclesiastical court, they were not bound to give the party a copy of the articles. But the law is otherwise; for in such cases, if they refuse to give a copy of the articles, a prohibition shall go *quousque* they deliver it.

2 Ld. Raym. 991; *per* Holt, C. J., and so ruled by him in a like case. Salk. 553.

On motions for prohibitions (b) it is frequent in doubtful cases to grant them *nisi*, or that the adverse party should show cause why they should not be granted. Also in nice and difficult cases, (c) it is usual to direct the plaintiff to declare on his prohibition, (d) and so proceed to issue, (e) that the merits of the cause may be brought before the court with the greater exactness, and they thereby be the better enabled to judge of the reasonableness of granting or refusing the prohibition. [(g) But if the court be clearly of opinion that there is no ground for a prohibition, it ought to be denied, without putting the defendant to expense, and delaying in the mean time the exercise of what appears to them a lawful jurisdiction. For this denial is not conclusive to the plaintiff. If there is no jurisdiction the sentence will be a nullity, and upon any attempt to excuse or enforce it, the whole may be tried in an action. (h) The plaintiff may also apply to any other court in Westminster-hall for a prohibition, and take their opinions. *Per* Lord Mansfield.

(b) Ld. Raym. 236. (c) Cro. Eliz. 736; 4 Mod. 151, 152; Lev. 125; Raym. 88. (d) Stile's Pract. Leg. 473. (e) If the jury, upon an issue joined in a prohibition *de modo decimandi*, find a different *modus*, yet the defendant shall not have a consultation; for it appears that he ought not to sue for tithes in specie, there being a *modus* found. Vent. 32, *vide supra*. (g) Saint John's College v. Todington, 1 Burr. 198, 199. (h) Lindo v. Rodney, Dougl. 620.

If, however, the court incline in favour of the prohibition, the defendant has, it seems, a right to put the plaintiff to declare: and having such right, he may of course waive it, and, after a rule given to declare, submit and stay proceedings.

1 Burr. 198; 2 Str. 1149, *Gegge v. Jones*.]

The court is not obliged to give direction for such declaration, but are absolute judges of the sufficiency or insufficiency of the suggestion.

Leon. 181.

[Where the party is ordered to declare in prohibition, he ought not to take out the writ, for serving the other side with a rule is sufficient; and if in that suit he obtain judgment, the judgment is *stet prohibitio*, otherwise it is *eat consultatio*; therefore, if the party be excommunicated, the mandatory part of the writ to assail the party is not to be obeyed till after trial had.

Dean and Bishop of Wells, Mich. 25 Geo. 2.

The declaration in prohibition is a *qui tam* declaration, for it supposes a contempt to the king in proceeding after the writ delivered. But the contempt is merely form, not traversable, and no verdict need be given about it.

12 Co. 61; Stratford v. Neale, Stra. 482; Seed v. Wolene, Barn. 148.]

(G) Whether more than one such Writ is to be awarded.

If the declaration varies from the suggestion, this is naught, and a consultation will be awarded.

7 Mod. 113, 114; Leon. 128, for the surmise is as the writ.

[Where an issue is joined in a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they shall give no more than 1s. damages; for it is in nature of an issue to inform the conscience of the court: but, after he has had judgment, *quod stet prohibitio*, he may bring his action upon the case, and recover the damages he has sustained.

Carter v. Leeds, Mich. 2 G. 2.

In tithe cases, and matters of such sort, where many things are in controversy, it is frequent to order the prohibition to stand as to part, and a consultation to go as to the other part.

1 Ld. Raym. 59.]

(G) Whether more than one such Writ is to be awarded.

By the 50 E. 3, c. 4, it is enacted, "That where a consultation is once duly granted upon a prohibition made to the judge of Holy Church, (a) that the same judge (b) may proceed in the cause by virtue of the same consultation, notwithstanding any other prohibition (c) thereupon to be delivered; (d) provided always, that the matter in the libel of the said cause be not enlarged or otherwise changed." (e)

(a) Intended spiritual judge, and therefore this statute extends not to the Court of Admiralty. 2 Brownl. 35. (b) Ecclesiastical judge in general, or person competent, and not the same individual person. Poph. 159; Palm. 418; Latch, 6, 75. (c) But if the first prohibition was unduly obtained, as on proceedings by English bill in Chancery, &c., a second prohibition may be awarded notwithstanding this statute. Cro. Eliz. 736, p. 5. (d) Whether proceeding out of the same court or another, if for the same cause. Cro. Eliz. 277. (e) 2 Roll. R. 207.

This statute hath been construed to extend to those cases where a consultation hath been lawfully granted; that is, upon the right and merits of the thing in question, and not to such cases where for defect of form, misprision of a clerk, misleading an act of parliament, &c., consultations have been awarded.

2 Brownl. 26, 247; Leon. 130; 3 Bulst. 182; Moor, 917.

So, if a consultation be awarded for default of proof of the suggestion, pursuant to the statute 2 & 3 E. 6, c. 13, the plaintiff is not precluded, but may bring another prohibition; (g) for this statute goes to the suggestion made upon the same libel, (h) and to a consultation duly granted, and not to the case of not having witnesses ready to prove the suggestion through negligence.

Jones, 231; Yelv. 102; Cro. Car. 208; 2 Keb. 719. (g) But must pay double costs. Carth. 463. (h) It is said by Justice Holloway, that after a consultation awarded for not proving his suggestion, &c., the party shall be for ever barred from having another prohibition on the same libel. Comb. 63.—[*Sed qu.*]

A motion was made for a prohibition to a suit for tithe-lamb, upon suggestion of a *modus* to pay 2d. a lamb for lambs falling in the plaintiff's farm in the parish. It was objected, that a prohibition was granted before to stop this suit, upon a suggestion, which was tried and found for the plaintiff, and a consultation granted. But it was answered, that that suggestion was for every lamb which fell in the parish, whereas this only is for lambs falling

(H) At what Time to be granted, &c.

in a particular farm, and so not within this statute. However the court inclined against the prohibition, thinking it within the statute.

2 Vent. 47.

If upon the trial of a suggestion the plaintiff be nonsuit, no new prohibition shall be granted, although the nonsuit was occasioned for want of some of the plaintiff's witnesses, who were to prove the truth of the suggestion, and who were necessarily obliged to be absent.

Keb. 286. [See Com. Dig. tit. Prohibition (K.) 4, *contr.*]

If the ecclesiastical court refuse to grant a copy of the libel, for which a prohibition is granted, and thereupon they grant the copy, and afterwards proceed in the cause, the matter not being within their jurisdiction, another prohibition lies.

Moor, 917.

[A prohibition was granted in a suit for tithes, upon a suggestion that the lands were barren and newly improved, and a trial had on the declaration in prohibition, and a verdict for the plaintiff that the lands were not barren, on which a consultation was granted, and he obtained sentence. From the inferior court there was an appeal to the Arches, and an allegation entered that the land was barren; and the court there were proceeding to reverse the sentence, because barren land, though contrary to the verdict at law; upon which a prohibition was granted *quoad* the allegation of barren land.

Owen v. —, 2 Show. 195.]

If the defendant in a prohibition die, his executors may proceed in the ecclesiastical court, and the judges of the court, out of which the prohibition was granted, will also in such case make a rule to the spiritual court to proceed; but the plaintiff may, if he please, have a new prohibition against the executors.

Lit. R. 155.

(H) At what Time to be granted; and herein, in what Cases it may be granted after Sentence.

It is clearly agreed, that in all cases where it appears upon the face of the libel, that the Admiralty, Spiritual Court, &c., have not a jurisdiction, (a) a prohibition may be awarded, and is grantable as well after as before sentence; for the king's superior courts have a superintendency over all inferior jurisdictions, and are to take care that they keep within their due bounds.

2 Inst. 602; 2 Roll. Abr. 318, 319; Noy, 137; Sid. 65; Cro. Eliz. 571; Moor, 462, 907; Skin. 299, pl. 2; Carth. 463; March, 153; 2 Roll. R. 24; Comb. 356; *United States v. Peters*, 3 Dallas, 121. *g* [Ca. temp. Hardw. 317; 1 Burr. 314; 2 Burr. 813; 3 Burr. 1922; 2 Stra. 1133; 4 Burr. 2037; Cowp. 424. (a) Either never had any at all, or have exceeded that which they had. 3 Term R. 37. Prohibition will be granted to a court of appeal where it appears that they have no jurisdiction over the subject matter, even after they have remitted the suit to the court below, and awarded costs against the appellant, if they are proceeding to enforce the payment of these costs. *Darby v. Cosens*, 1 Term R. 552. On a libel to charge a man to repair a church in respect of a light-house, a prohibition was granted after sentence, and an appeal to the Delegates. *Sir Isaac Rebow v. Bickerton*, Bunn. 81.]

But where the court has a natural jurisdiction of the thing, (b) but is restrained by some statute; as by 23 H. 8, c. 9, for citing out of the diocese, there the party must come before sentence; for after pleading and

(H) At what Time to be granted, &c.

admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition.

Vide the authorities *suprà*, and Cro. Car. 97; 2 Show. 145, pl. 123, 155, pl. 141; Vent. 61; 6 Mod. 252; 7 Mod. 137; Godb. 163, 243; 5 Mod. 341; Hetl. 19; 12 Co. 76. (b) 2 Salk. 549, like point; because the cause belongs to the spiritual court, and though not to that spiritual court, yet it belongs to some other, and not to the king's temporal courts; and vide Carth. 33, 34, where it appeared on the face of the libel, that the party was cited out of his proper diocese.—Cro. Jac. 429; Cro. Car. 97; Comb. 448, where the party obtained a prohibition before sentence, but did not serve it till two terms after, which was after sentence definitive, it was held to be too late.

||However, it is now decided that where a spiritual court incidentally misconstrues an act of parliament contrary to the rules of the common law, a prohibition lies even after sentence; for until sentence the courts of common law have no reason to suppose that the ecclesiastical court will determine wrong, and the misconstruction is matter of prohibition rather than of appeal.

Gould v. Gapper, 5 East, 345; 3 Ibid. 472; *sed vide* Stainbank v. Bradshaw, 10 East, 349.

And where it appears on the face of the proceedings that the spiritual court have exceeded their jurisdiction, a prohibition will be granted, though after sentence.

Leman v. Goulty, 3 Term R. 3.

Therefore, though they may compel churchwardens to deliver in their accounts, yet as they cannot decide on the propriety of the charges, a prohibition will be granted if they do.

Leman v. Goulty, 3 Term R. 3.

But after sentence it is incumbent on the party making the application, to show clearly that the spiritual court had no jurisdiction.

2 Term R. 475.||

[If a man libels in the spiritual court for tithes in kind, and the defendant below suggests and insists upon a *modus*, *there*, the spiritual court have no jurisdiction to try the *modus*, their method of trial of prescription being different from ours: but, if a man libels for a *modus*, and the defendant admits the *modus*, the spiritual court may proceed in the cause. But even in the first case, if the party permit the spiritual court to proceed to sentence, he comes, *then*, too late for a prohibition, it being *pro defectu triationis* only; but a party can never be too late, where it is *pro defectu jurisdictionis*.(a)]

Offley v. Whitehall, Bunb. 17.] ||(a) See 4 Barn. & C. 314; 3 Term R. 3.||

||Where a defendant in a tithe suit applied for a prohibition on affidavit, that he had *answered on oath*, or *pleaded* to the libel a *modus*, &c., it was objected that the defendant had only put in an answer of a *modus*, and that his application was too soon, until he had regularly pleaded it; but the court said the prohibition must be granted, as it appeared there was nothing to try but the *modus* insisted upon in the answer.

French v. Trask, 10 East; 348, S. C., 15 East, 574.

And when once it appears by the proceedings in the spiritual court, that the prescription instead of being admitted is disputed, and that the parties are in progress to bring its existence to trial, the courts of common law are not bound to wait till the parties have incurred the expense of putting it in issue, but the prohibition is grantable at once.

Per Bayley, J., 5 Barn. & C. 22.||

Vcr. VIII.—29

(I) By and to what Courts awarded, &c.

Upon a motion for a prohibition, the case was, the defendant libelled in the spiritual court for tithes of fagots made of loppings of trees; and the suggestion for a prohibition was, that these loppings were cut from the stumps of timber-trees above the growth of twenty years; and it was alleged, that sentence was given in the spiritual court, and therefore the plaintiff comes here too late to have a prohibition: but, *per* Holt, C. J., the sentence will not hinder the having a prohibition in any case, but in case of prohibitions grounded upon 23 H. 8, c. 9, for not citing out of the diocese; but because the plaintiff had not pleaded this matter in the spiritual court, they denied the prohibition, because the spiritual court has a general jurisdiction of tithes; and if any special matter deprives them of their jurisdiction, it must be pleaded there; and if it had been pleaded there, and issue joined upon it, and upon the trial it had been found not to be *silva cædua*, it had been well; but if they had refused to admit the plea, a prohibition should have been granted.

2 Ld. Raym. 835, *Dike v. Brown*.

(I) To what Courts a Prohibition may be awarded: And herein, that the Superior Courts are to determine the Boundaries of all inferior Jurisdictions.

THE king's superior courts of Westminster have a superintendency over all inferior courts of what nature soever, and are by law intrusted with the exposition of such laws and acts of parliament as prescribe the extent and boundaries of their jurisdiction; so that if such courts assume a greater or other power than is allowed them by law, or if they refuse to allow acts of parliament, or expound them otherwise than according to the true and proper exposition of them, the superior courts (a) will prohibit and control them.

F. N. B. 43, 45; 4 Inst. 231, 249; 3 Bulst. 120; 2 Roll. Abr. 317, 318. (a) The honour of F. R. to keep inferior courts in order. 2 Roll. R. 471.

Hence prohibitions are grantable to almost all sorts of courts which differ from the common law in their proceedings, to the courts Christian, (b) to the Admiralty, nay to the Delegates, (c) and even to the steward and marshal, upon the statute of *articuli supra chartas*.

Show. P. C. 63. (b) That the spiritual jurisdiction exercised within this realm is derived from the king. Dav. 97. (c) Where they exceed their authority, or proceed in matters not properly within their cognisance, may be prohibited. Moor, 460, 463; Latch, 85, 86. [So they are grantable to naval and military courts-martial. 2 H. Bl. 100.] β See *United States v. Peters*, 3 Dall. 121; *State v. Wakely*, 2 Nott & M'C 410; *Reese v. Lawless*, 4 Bibb, 394.

A prohibition lies to the convocation, *si concilium teneant de aliquibus quæ ad coronam regis pertinent, vel quæ personam regis, vel statum suum, vel statum concilii sui contingunt*.

4 Inst. 322. Lay to the high commission court. 4 Inst. 333; Lit. R. 152, 189, 274.

Prohibitions have been granted to the marches of Wales, of which there are many instances.

4 Inst. 243; 2 Roll. Abr. 317; Roll. R. 309, 311; Winch. 78, 103; Raym. 191; Vent. 300; Jon. 248.

As where a bill of foreclosure was brought against one in the grand sessions for the county of Montgomery, upon a mortgage of lands that lay there, but the party himself was not an inhabitant; it was held in this case, that a prohibition ought to go; for that the party living out of the

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jurisdiction could not be served with process, and, consequently, could not be guilty of a contempt, on which a sequestration on his lands could be grounded.

2 Ld. Raym. 1408, Vaughan v. Evans; 1 Stra. 630, S. C.; 8 Mod. 374, S. C.

So prohibitions have been granted to the county palatine of Chester in many instances where they have exceeded their jurisdiction.

Hutt. 59; 2 Roll. Abr. 318; Stile, 285; 3 Bulst. 116; Hob. 15; Roll. R. 246, 331; Sid. 180.

So prohibitions have been granted to the duchy court of Lancaster, (a) for holding plea of land, not parcel of the duchy, (b) for determining on the validity of letters patent granted of a manor.

(a) 2 Roll. Abr. 317, 318; Hob. 77. (b) 3 Bulst. 119; Roll. R. 252; Skin. 43, pl. 14.

So where a suit was commenced in the duchy chancery court, to discover matters whereby the defendant there would forfeit his freehold; a prohibition was granted.

2 Salk. 550, pl. 11.

A prohibition was moved for to the Chancery court of the Cinque Ports, in which a bill was filed, setting forth a custom, that every ship that used the pier of Ramsgate should pay 4*d.* for all their gettings in the year, for the maintenance of the pier, and for a discovery of the defendant's gettings; and such prohibition was held to lie, as to the custom, which is only triable by law; but the court held, that such bill might be proper as to the discovery.

Comb. 261.

A prohibition was prayed to the court of the chamberlain of Chester, where an English bill was preferred, setting forth that J S being indebted to the plaintiff, the defendant upon good consideration promised that if J S did not pay it he would, and that he wanted such precise proof as the law required, and so prayed to be relieved by the equity of the court: the defendant confessed the promise in his answer, and said that he had paid the money: and a prohibition was granted; for the plaintiff had now obtained the end of his suit, and might have remedy at law upon the evidence of the defendant's answer.

Vent. 212, Mekins v. Minshaw.

The plaintiff in prohibition suggests, that by the laws of England, when issue is joined between the parties, it ought to be tried by the evidence *viva voce*, and not by notes or minutes of their testimony: That an information was exhibited against him before the commissioners of excise pursuant to 12 Car. 2, c. 23, and 15 Car. 2, c. 11, setting forth that he was a common brewer, and did keep a common store-house without acquainting the said commissioners therewith; that he was found guilty; and that he appealed from their sentence to the commissioners of appeals, before whom the informer did produce as evidence the minutes taken before the commissioners of excise, and that the witnesses who gave evidence there were still alive; which minutes were allowed as evidence by the commissioners of appeals, &c., and after great consideration a prohibition was granted *quoad* the admitting this evidence.

2 Salk. 555; 5 Mod. 272, 278, S. C.; Bredon v. Gill, Ld. Raym. 219; Comb. 414.

If the commissioners for determining policies of insurance grasp at more

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power, or proceed otherwise than as they are enabled by the acts of parliament which create their jurisdiction, they will be prohibited by the king's superior courts.

Vide 396, Show.

A prohibition lies to the vice-chancellor's court in Oxford and Cambridge, where they exceed their jurisdiction.

Lit. R. 10.

On a motion for a prohibition to the court of the vice-chancellor of Cambridge, it was suggested that one Richardson had a libel preferred there against him, because he had preferred an information in this court against divers persons for a riot committed within the jurisdiction of their court, and the libel was read in this court; and upon that the court declared, that their jurisdiction was concurrent but not exempt from this court, and that they ought to plead their privilege here, if they had any such privilege, but they ought not to proceed against the informer as a criminal; and so the court granted a prohibition, *nisi*, upon the motion of Sergeant Scroggs.

Mich. 26 Car. 2, in B. R., Richardson's case.

If justices of peace take upon them more jurisdiction than they are allowed by law, as where they determined on the statutes of usury, a prohibition lies.

Lit. R. 163.

¶ The Court of B. R. refused a prohibition on application of the inhabitants of Dorsetshire to restrain the justices of the county from pulling down an old bridge before the new one was passable; the application being a novel one, and the parties having a remedy by indictment if the act were a nuisance.

Rex v. Justices of Dorset, 15 East, 494.¶

So a prohibition lies to the court of stannaries, which is confined to tin matters only, and where the parties who sue, or one of them, is a tinner, if they exceed their jurisdiction.

4 Inst. 229; Cro. Car. 333.

A prohibition was granted to the council of York for holding pleas in replevin and avowries; the court being clearly of opinion that these are matters determinable at common law.

Bulst. 110.

So a prohibition hath been granted to the court of requests, for enjoining a creditor to give time to his debtor to pay his debt upon security given.

Bulst. 20.

It hath been resolved, that a prohibition lies to the court of the Earl Marshal for proceeding against a person for painting arms and marshalling funerals.

Show. P. C. 58, in the case of Dr. Oldis and Donmille, where there is good learning on this subject. 4 Mod. 128, S. C.

So a prohibition was holden to lie to the court of honour, to prohibit a suit there for these words, *you a knight! you are a pitiful fellow*; and in this case Holt, C. J., at first doubted whether there was or could be any such court; but said a prohibition would lie to a pretended court.

2 Salk. 553 pl. 18; 7 Mod. 125, Chambers v. Sir John Jennings. [A prohibition will go where visitatorial authority is usurped. Reg. 40 b.]

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¶ A prohibition was granted to the Bishop of Chichester to prohibit him from proceeding to present by lapse, under pretence of visitatorial authority, to the office of canon residentiary of the cathedral, it being a freehold office, and the right of election being in the dean and chapter.

Bishop of Chichester v. Harward, 1 Term R. 650.¶

It is said by my Lord Coke in 3 Bulst., that the Court of King's Bench may prohibit (a) any court in Westminster-hall, if they exceed their jurisdiction. But this notion of Lord Coke, of which he was very fond, especially as to proceedings in courts of equity, hath been so shaken and contradicted of late years, that his authority herein seems to be but of very light weight; but for this we must refer to title *Courts and their Jurisdiction*.

3 Bulst. 120. (a) If the judges of C. B. hold plea of an appeal, a prohibition is to be granted by B. R. 3 Bulst. 120.—So if the Court of Exchequer hold common pleas without a writ of privilege. 3 Bulst. 120; and vide 2 Salk. 550, pl. 12.—So an English court, or court of equity, holding plea of a thing whereof judgment was given at common law, hath been prohibited. Moor, 836; Cro. Ja. 335.—But for this vide Jurisdiction of the Court of Chancery, and Ld. Raym. 531. ¶ In prohibition a writ of error does not lie from the K. B. to the Exchequer Chamber. 5 Barn. & C. 765.¶

¶ It appears doubtful whether the Court of B. R. has authority to direct a prohibition to the Lord Chancellor sitting in bankruptcy. The following case was determined without deciding that question:—A motion was made for a prohibition to restrain the Lord Chancellor from proceeding on an order made by him on the assignee of a bankrupt. It appeared that the assignees had seized, as the property of the bankrupt, a farm belonging to A B, and had kept it a long time and mismanaged it. The commission was afterwards superseded. A B's title to the farm was established by a verdict at law, and the Lord Chancellor referred it to the Master to take an account between A B and the assignees in respect of such property and the mismanagement; and afterwards, on the Master's report, ordered a certain sum to be paid to A B by the assignees. In support of the motion it was contended, that the Lord Chancellor sitting in bankruptcy had no jurisdiction to make this order: 1st, Because the commission had been superseded before the order was made. 2d, Because the sum directed to be paid was composed in part of damages for the mismanagement of the farm, which could only be ascertained by a jury in an action at law. 3d, Because the order was not confined to a payment out of funds in the hands of the assignee, but operated personally on the parties by whom the payment was to be made. But the court overruled all these objections, and held that no want of jurisdiction appeared; that where the Lord Chancellor had jurisdiction generally the Court of B. R. could not revise his orders; and that the *final order* of the Lord Chancellor was analogous to a final judgment or decree, after which a prohibition could not be granted, unless an original want of jurisdiction was apparent on the face of the proceedings.

Ex parte Cowen, 3 Barn. & A. 123.¶

The superior courts of Westminster not only grant prohibitions where inferior courts assume a jurisdiction, which properly belongs to such superior courts, but also in cases where one inferior court encroaches upon another, and that even in matters in which such superior courts have not a jurisdiction.

Lit. R. 42; 2 Roll. R. 471.

As if the ecclesiastical court grant the probate of a will made within a

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manor, when by custom or of right such probate belongs to the lord of the manor.

5 Co. 73; Show. P. C. 63.

So where the marches of Wales held a plea of a matter that belonged to the court Christian, it was holden that a prohibition lay.

2 Roll. Abr. 313; Winch. 78.

So in London, where the lord mayor and court of aldermen have the government of city orphans, if any orphan sue in the ecclesiastical court or elsewhere, for a legacy or duty due to them by custom, a prohibition lies.

4 Inst. 249.

If a bishopric be void, and the jurisdiction devolve on the metropolitan, he must hold the courts within the inferior dioceses, otherwise he will be prohibited.

Hob. 178.

|| A prohibition does not lie from the court of C. B. nor (*come semble*) from any of the courts to a bishop to restrain him from committing waste in the possessions of his see,—at least at the suit of an uninterested stranger.

Jefferson v. Bishop of Durham, 1 Bos. & Pul. 105; *sed vide* 3 Swanst. 493, 499.||

If there be a controversy, whether such a will ought to be proved before a peculiar or before the ordinary; whether by the archbishop of one province or another, or both; and what shall be *bona notabilia* (a): In these and the like cases the common law retains the jurisdiction of determining.

Mod. 211, per North, C. J. (a) But in 10 Mod. 272, this point is taken notice of and denied to be law, for that the spiritual and common law are the same as to *bona notabilia*; and there said, that if a prohibition lay, there must be frequent instances of it.

(K) Prohibitions to inferior Temporal Courts, in what Instances to be granted.

It is clearly agreed that a prohibition doth lie as well to a temporal court as to the spiritual, Court of Admiralty, or other court, whose proceedings are different from the common law, if such temporal court exceeds the bounds of its jurisdiction, or take cognisance of (b) matters not arising within its jurisdiction.

F. N. B. 45; 2 Inst. 229, 243, 601; 2 Roll. R. 379; Roll. R. 252. (b) Or if but part only, cannot have jurisdiction. *Ld. Raym.* 698.

As if trespass *vi et armis* be brought in the county court, a prohibition lies to the plaintiff or sheriff.

F. N. B. 47.

So if one sue another in a court-baron or other court, which is not a court of record, for charters concerning inheritance or freehold, there shall be a prohibition.

F. N. B. 47.

A person having obtained judgment in B. R. for his debt and damages, brought his action for the recovery of them against the bail in the court of the Tower of London, in which action the party was taken on a *capias*, and was rescued; (c) after which the plaintiff brought his action on the case in the same court for the rescue; and all this appearing to the court of B. R. they granted a prohibition.

Roll. R. 54. (c) If an officer let a man at liberty who is in execution upon a bond sued in an inferior court, the bond not being made within the jurisdiction thereof, this is no escape. 2 Mod. 29, *Squibb v. Hole*.—So where the plaintiff in an action brought against an officer, declared in Hull upon a bond made at Halifax, and had judgment and

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execution, and the defendant escaped, in an action brought for this escape the declaration was held ill, because it did not allege the bond to be made *infra jurisdictionem curiæ*. Roll. Abr. 809, *Richardson v. Bernard*.

So, where an action of debt was brought in the Marshalsea, on a judgment in B. R. a prohibition was granted.

2 Salk. 439, pl. 2.

A suit was surmised to be before the Lord President of the Marches, for an office, between the grantee of the Lord President and a stranger, wherein the only question would be, Whether the grant of that office belonged to the Lord President? and because in this case he would be as it were both judge and party, (a) a prohibition was granted.

Keb. 648. (a) Salk. 396, pl. 1. That where a judge has an interest, neither he nor his deputy can determine a cause or sit in court, and in so doing a prohibition lies. Hard. 503.

If there be one entire contract above 40s., and a man sue for it in a court-baron, severing it into divers small sums under 40s., a prohibition shall be granted, because this is done to defraud the court of the king.

19 H. 6, 5; 2 Roll. Abr. 280; F. N. B. 46. β As to the right of a party to sever his claim, see *Stroh v. Uhrich*, 1 Watts & S. 57; *Ingraham v. Hull*, 11 Serg. & R. 78; *Dews v. Eastham*, 5 Yerger, 297; *Township of Saddle River v. Colfax*, 1 Halst. 115; *Griffith v. Clute*, 4 Halst. 464; *Colman v. Parcell*, 1 Penning. 561; *Sanders v. Stratton*, *Ibid.* 528; *Caldwell v. French*, *Ibid.* 613. γ

An action was brought in the hundred court for 40s., in which action the plaintiff confessed that he was satisfied one shilling, which being done with an intent to give that court jurisdiction, and to defraud the superior courts, a prohibition was granted.

Palm. 564, *Clarke v. Corke*.

If there be several contracts between A and B at several times for divers sums, each under 40s., but amounting in the whole to a sum sufficient to entitle the superior court to a jurisdiction, they shall be sued for in such superior court, and not in an inferior one, which is not of record.

Vent. 65, said to have been adjudged in the case of the Savoy court and Stanford.

So, in a prohibition to the court of the honour of Eye, where the case was: One contracted with another for divers parcels of malt, the money to be paid for each parcel being under 40s., and he levied divers plaints thereupon in the said court; wherefore the court here granted a prohibition; because, though there be several contracts, yet, inasmuch as the plaintiff might have joined them all in one action, he ought to have so done, and sued here, and not put the defendant to unnecessary vexation, any more than he can split an entire debt into divers, to give the inferior court jurisdiction *in fraudem legis*.

Vent. 73, *Girling v. Alders*; 2 Keb. 617, S. C.; Show. 11, S. C. cited.

It is laid down by my Lord Coke, and admitted in a great variety of cases, that no inferior court can hold plea of an obligation, contract, battery, or other transitory action, if not made within the jurisdiction, and that the cause of action must be alleged to arise within such jurisdiction.

2 Inst. 231; Sand. 74; 2 Johns. 230; Show. 10; et vide tit. *Courts and their Jurisdiction*.

And therefore, in an action on a promise in an inferior court, not only the promise, but the consideration must be alleged to arise within the inferior jurisdiction, and must be so proved on the trial.

Roll. Abr. 545, 809.

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But, if the plaintiff had shown that the money had been lent *infra jurisdictionem curiæ*, or if it had been for goods there sold, the plaintiff would have had no need to say that the defendant assumed to pay *infra jurisdictionem curiæ*; because the law creates the promise upon the creation of the debt, which debt being within the jurisdiction, the promise shall be intended there also.

Ld. Raym. 211; but see *contra* Ld. Raym. 1042.

In all cases where inferior courts assume a jurisdiction, or hold plea of a matter not arising within their limits, the party hath his remedy, and may stay their proceedings by prohibition. But such prohibition can only regularly be obtained by its appearing, on oath made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused.

6 Mod. 146; Carth. 402; Salk. 201, pl. 3; 1 P. Wms. 476, pl. 135.

In the case of *Mendyke v. Stint*,^(a) it was greatly insisted upon, that, though the party neglected to plead to the jurisdiction, yet the matter arising out of the inferior jurisdiction, the superior courts ought to grant a prohibition; for that otherwise the parties, their counsel and attorneys, would give a jurisdiction to inferior courts which they were not entitled to by law. But it was otherwise adjudged in this case; and it seems to be now agreed, that after admitting the jurisdiction, or after imparlance,^(b) the party cannot apply for a prohibition.

(a) 2 Mod. 271, 272. (b) Vide *Imparlance*, under tit. *Pleadings*.

But in the above-mentioned case these things were agreed by the court, 1. That if any matter appears in the declaration, which sheweth that the cause of action did not arise *infra jurisdictionem*, there, a prohibition may be granted at any time. 2. If the subject matter in the declaration be not proper for the judgment and determination of such court, there, also, a prohibition may be granted at any time. 3. If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead it, &c., or, if his plea be not accepted, or is overruled; in all these cases, a prohibition likewise will lie at any time.

2 Mod. 273. [See *acc.* Cro. Ja. 96; 1 Term R. 552; 3 Term R. 3, 315.]

A motion was made for a prohibition to be directed to the sheriff's court in Bristol, upon suggestion that causes of action arising out of the jurisdiction of the sheriff's court ought not to be sued there; and this motion was made in behalf of the defendant in the action, before he had appeared, to stay the proceedings of the court, who proceeded to attach his goods in the hands of a garnishee. Sir B. Shower opposed the motion; because the defendant could not pray a prohibition upon suggestion of a matter which he could not plead; and as here he could not plead this before appearance, so he ought not to make such a motion before appearance. And *per* Holt, C. J.—A man shall not plead to the jurisdiction until he appear; but if the original cause of action arose out of the jurisdiction of the court, the garnishee may plead it; and of that opinion, he said, was Hale, C. J.; but, if it was debt upon a simple contract, it is attachable where the person of the debtor is.

Ld. Raym. 346, *Coke v. Licence*.

So, in the case of *Clerk v. Andrews*, where Shower moved for a pro-

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hibition to the court of the sheriffs of London to stay proceedings, where they attached the debt of the garnishee, because it arose out of the jurisdiction; it was denied, because the debt was upon simple contract, which follows the person of the debtor.

Show. R. 9; cited Ld. Raym. 347.

[The misinterpretation of a statute by an inferior court, the consideration of which ariseth incidentally in the course of a proceeding, which is confessed to be within its jurisdiction, should seem to be rather a matter of appeal than a ground for a prohibition. But clearly in such a case a prohibition will not lie, unless it be made appear to the superior court, that the party applying for the prohibition has, in the course of the proceedings in the inferior court, alleged the grounds for a contrary interpretation of the statute on which he applies for a prohibition, and that the inferior court has proceeded notwithstanding such allegation.

Home v. Earl of Camden, 1 H. Bl. 487; 4 Term R. 382; 2 H. Bl. 533; *sed vide* 5 East, 345; 3 East, 472.]

As no right is vested by any of the prize acts in the captors of an enemy's ship and cargo in war, before the ultimate adjudication of the courts of prize; it follows, that the issuing of a monition to the prize agents by the court of commissioners of appeals in prize causes, to bring in the proceeds of a ship and cargo, which have been sold, after a sentence of condemnation as lawful prize, but from which sentence there is an appeal, (on a subject distinct from the question, whether prize or not, which is not disputed,) cannot be a ground for a prohibition to that court, for the monition neither interferes with nor defeats any vested rights.

1 H. Bl. 487; 4 Term R. 382.]

||Naval courts-martial, military courts-martial, courts of admiralty, courts of prize, are all liable to the controlling authority which the courts of Westminster-hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given them, the general ground of prohibition being an excess of jurisdiction, when they assume a power to act in matters not within their cognisance. But where the matter is clearly within the jurisdiction of the inferior court, a mere error in the proceedings may be a ground of appeal or review, but not of prohibition.

Grant v. Gould, 2 H. Black. 100; *β* State v. Wakeley, 2 Nott & M.C. 410.

And the courts will not grant a prohibition to the admiralty prize-court against proceeding in a suit which involves a question of prize; for the court is within its jurisdiction.

1 Madd. 15.]

(L) Prohibitions to the Spiritual Court, in what Instances: And herein,

1. *Where they meddle with a Matter purely Temporal.*

If one sues another in the spiritual court for a chattel or debt, the defendant shall have a prohibition. So, if he sues for a trespass.

F. N. B. 40.

||Therefore a prohibition was granted to stay a suit in the spiritual court, for breaking open a chest in the church, and taking away the title-deeds to the advowson; for trespass or trover was the proper remedy.

4 Term R. 351.]

(L) Prohibitions to the Spiritual Court, &c.

If the spiritual courts take upon them to try the boundaries of parishes, a prohibition lies.

2 Roll. Abr. 291; 7 Co. 44; Roll. R. 332; Cro. Eliz. 228; 3 Leon. 129; 3 Keb. 286, S. P., *per* Hale, C. J., because the prescription is the ground thereof.

As, if a suit be by a parson for tithes, and the defendant plead, that the place for which the tithes are sued is in another parish, a prohibition lies; because they meddle with that which is out of their jurisdiction, though the original thing be of their cognisance, and this come in obliquely. (a)

2 Roll. Abr. 282; Show. 10, cited Noy, 147, S. P., but that it must so appear by the pleadings in the spiritual court. Vent. 335, S. P., and that a plea thereof must be tendered in the ecclesiastical court. (a) So, where the defendant pleaded that he resorted to and received the sacrament in a different parish from that in which he inhabited. R. Bulst. 159; C. Hard. 406; D. Salk. 166, pl. 6; 6 Mod. 188.

So if a vicar of a parish libel against another to avoid his institution to the church of D, which he supposes to be a chapel of ease appertaining to his vicarage, and the defendant suggest, that D is a parish of itself, and not a chapel of ease; a prohibition will be granted, for they shall not try the bounds of the parish.

2 Roll. Abr. 291. [The bounds of parishes, though coming in question in a spiritual matter, shall be tried in the temporal courts. This is a maxim in which all the books of common law are unanimous; though our provincial constitutions expressly mention *Limites parochiarum* among the matters *quæ merè ad forum ecclesiasticum pertinere noscuntur*, and *quæ non possunt ad forum seculare aliquatenus pertinere*, complaining of this as one encroachment, among others, which the temporal courts were making upon the spiritual at that time. Gibs. Cod. 239.]

So if the question be in the court Christian, Whether a church be a parochial church, or but a *chapel of ease*; a prohibition lies.

2 Roll. Abr. 291, several cases to this purpose.

But if the bounds of two villis lying in the same parish come in question in the spiritual court, no prohibition lies; for that such bounds are triable in the ecclesiastical court, though those of parishes are not.

Lev. 78, *Petler v. Yealman*; [1 Sid. 89, S. C; 1 Keb. 399, S. C; 2 Roll. Abr. 312, pl. 7, S. P. But see Gibs. Cod. 239.]

The ecclesiastical courts have cognisance of a way to a church, and for not repairing such way the parties may be proceeded against in the spiritual court.

March, 45.

So, if a parson is prevented from carrying away his tithes by the stopping up the usual way, he may have his remedy in the ecclesiastical court, grounded on the statute 2 & 3 E. 6, c. 13.

Bulst. 67; Jon. 230.

But if the question be, Whether he is to have one way or another, or whether such a way be a highway or not? (b) this cannot be tried in the spiritual court.

March, 45; Bulst. 67. (b) 2 Roll. Abr. 287, S. P. adjudged.

So, if the churchwardens of a church sue for a way to the church, which they claim to appertain to all the parishioners by prescription, a prohibition shall be granted; for this right being grounded on the prescription, is to be tried in the temporal courts.

2 Roll. R. 41, 287.

If a man be admitted, instituted, and inducted, and a suit be commenced in the ecclesiastical court to avoid the institution, supposing it not valid;

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though the thing be of their cognisance, yet, because the induction, which is temporal, and gives a lay right, may depend upon it, a prohibition lies.

Hob. 15; Latch. 205; Bulst. 179; Lit. R. 165; Poph. 133; Roll. Abr. 282; Show R. 10.

If there be a suit for tithes in the ecclesiastical court, and the tenant plead, that the party who sues is not incumbent, but that J S is, and this plea, because it goes to the right of the incumbency, be rejected, a prohibition lies; for by denying the tenant this liberty he might be twice charged for his tithes.

Cro. Eliz. 228; 3 Leon. 265, *Green v. Penilden*.

There are frequent instances of prohibitions being granted to the ecclesiastical courts to stay suits for fees by chancellors, registrars, and proctors in those courts, on this foundation, that demands *pro opere et labore* are properly determinable at common law, and that fees cannot be settled by the canon law; and that the spiritual court can only give costs and expenses of suit, but that no action of debt will lie for such costs at common law: and that the profits of an office being temporal, the remedy for them ought to be by *quantum meruit*; or in case it be an office of freehold, by assize; the denial of just fees being a disseisin. It therefore seems to be now settled, that neither a proctor nor registrar can sue for fees in the spiritual court; (a) but that the proper remedy is, in case of a fee certain, by an *indebitatus assumpsit*, or in case of an uncertain fee, by *quantum meruit*; and in such suits it is said not to be necessary to prove a retainer, that being implied by law.

2 Roll. R. 59; 3 Leon. 268; Mod. 167; 2 Keb. 615; 3 Keb. 33, 441, 516; Salk. 333, pl. 11; 5 Mod. 238; Bunb. 170; and 4 Mod. 254, where, *per Holt*, if a proctor might sue in the spiritual court for his fees, he would avoid the statute of limitations; and vide *Ld. Raym.* 703; *Cum.* 18; and *Vent.* 165, where notwithstanding it is said, that for such fees as are due by provincial constitutions they may sue in the spiritual court. 10 Mod. 262. [(a) The same law of an apparitor, *Pearson v. Campion*, *Doug.* 629.]

If a legatee takes a bond from the executor for payment of the legacy, and afterwards sues him in the spiritual court for the legacy, a prohibition will be granted; for by taking the obligation the nature of the demand is changed; and it becomes a debt or duty recoverable in the temporal courts.

Yelv. 38; 2 *Vern.* 31; but 2 *Roll. R.* 160, *S. P. cont.* [See 9 *Barn. & C.* 489.]

[Where a person is sued in the ecclesiastical court for a seat in the church, if he would obtain a prohibition, and oust the ordinary of jurisdiction, he must show such a legal title as cannot be tried in the ecclesiastical court, which can only be by *prescription*, and *prescription* can in such case be no otherwise proved than by showing repairs; therefore, in a declaration in prohibition, the plaintiff regularly ought to set out a custom of repairing: but if he do not, and if the defendant do not demur, but go to trial, it will be aided by the verdict, for the plaintiff ought not to have a verdict, unless he proves a custom to repair.

Stedham v. Hay, *Com. R.* 368.

If a churchwarden has made up his accounts, and had them allowed at vestry; if there is a libel against the churchwarden in the spiritual court, relating to his accounts, a prohibition shall go.

Nutkins v. Robinson, *Bunb.* 247; *Snowden v. Herring*, *Ibid.* 289.]

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||Where a suit was instituted in the spiritual court to obtain a *general* probate of the will of a woman, made during her coverture, with the assent of the husband, and the wife had survived him, a prohibition was granted; for by granting such a probate the spiritual court would be giving effect to a will which by the general rules of law could not have effect; for the husband could not by any assent enable his wife to dispose, by will made during the coverture, of property which she might acquire after his death, but only of property over which he himself had a disposing power.

Scammell v. Wilkinson, 2 East, 552.||

2. Where they determine on a Matter of Freehold.

Matters of freehold and the rights of inheritances are only determinable in the temporal courts; so that if the ecclesiastical courts intermeddle with those a prohibition lies.

F. N. B. 40; 2 Roll. Abr. 286; Lit. R. 164.

As, in a feoffment of tithes and lands, where there is no livery, if they adjudge the tithes to pass, notwithstanding there is no livery, a prohibition will lie.

Cro. Ja. 270; Vent. 41, cited.

So if a man devises, that his lands shall be sold for the payment of his debts, and that the overplus shall be paid to such and such persons in certain shares, the legatees in this case cannot sue in the ecclesiastical court; for the provisions intended them arise originally out of lands, and their proper remedy in this case is in a court of equity.

Dyer, 151, 264; Hob. 265; 2 Roll. Abr. 284, 285; 2 Show. 50, pl. 36; Cro. Car. 16.

But if a rent be devised out of a farm for years, the ecclesiastical courts may hold plea thereof; for the term for years being only a chattel is testamentary,^(a) and consequently the rent devised thereout.

Sid. 279; 2 Keb. 5; Lev. 179. ^(a) Where the legacy was to arise as well out of a term for years, as out of lands of inheritance, and the executor received it; but being dead without payment, so that no action of account could be brought at common law against his executor, it was held that the ecclesiastical court should have cognisance thereof. Cro. Ja. 279. Action of account is given against executors, by stat. 4 Ann. c. 16, § 27.

The rights of offices for life in the ecclesiastical or Court of Admiralty are determinable at common law: as, in the question concerning the validity of two patents, by which the office of a registrar to a bishop was granted, it was held, that this should not be tried in the spiritual court, though the subject-matter be spiritual; because the office itself being matter of freehold, is for that reason of temporal cognisance.

2 Roll. Abr. 285, 286; Noy, 91; Latch. 228; Palm. 450; Goldb. 390; Cro. Car. 65; 2 Roll. R. 306; Raym. 88; Lev. 125; 4 Mod. 27; Comb. 306.

Trespass on a glebe being freehold cannot be determined in the ecclesiastical court.

Bro. Jurisdiction, pl. 41.

A parson libelled against the defendant in the spiritual court of York for having cut elms in the churchyard; and a prohibition was granted, upon suggestion that they grew on his freehold.

Ld. Raym. 512, Hilliard v. Jeffreson.

[A prohibition was granted to a suit in the spiritual court for breaking a

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church wall, and cutting down the boughs of a tree in a churchyard; for the rector having a freehold in him has a right to bring his action, whereby the party would be subjected to a double prosecution. Besides, the ordinary cannot punish a trespass committed on the body of the church, unless it hinder divine service.

Binsted v. Collins, Bunb. 229.]

||But the Court of K. B. refused a prohibition, on application by a rector, to restrain the ordinary from granting a faculty to a parishioner, for stopping up a church window and erecting a monument, after the rector had expressed his dissent on citation; for the spiritual court had jurisdiction of the matter, and if the rector's dissent were improperly disregarded, that was matter of appeal, not of prohibition.

Bulwer v. Hase, 3 East, 217.||

3. *In what cases a Prohibition lies when they determine on Criminal Offences.*

It is clearly agreed, that the spiritual courts have no jurisdiction as to crimes and capital offences; so as to punish persons guilty of treason, felony, or other offences, which are cognisable in the king's temporal courts. But it is held, that a spiritual person may, especially after a conviction for a criminal offence at common law, be proceeded against *pro salute animæ*, and in order to a deprivation.(a) And this jurisdiction they are indulged in from a necessity of purging their body of all scandalous members. But they are not to inflict a collateral punishment for such matters as are only indictable at common law; and if they take upon them to do so, a prohibition lies.

Keilw. 181; *Dyer*, 293; *Cro. Ja.* 430; *March*, 174; *Hob.* 288; 2 *Ld. Raym.* 1507. ||(a) See *Free v. Burgoyne*, 5 *Barn. & C.* 400; 8 *Dow. & Ry.* 179.||

And therefore if a clerk be convicted of homicide or manslaughter, and afterwards libelled against, the libel ought not to charge that he is an homicide, or that he is guilty of manslaughter, &c., and if it do, a prohibition lies. But the regular way is only to charge that he was convicted of homicide, &c., and so the sentence of deprivation ought to be grounded on the conviction in the temporal court, without any further examination of the matter, by which the verdict there given is not to be impeached, but affirmed. And though the person convicted desire that he may be admitted to his defence in the spiritual court, to prove his innocency against the verdict, yet this is not to be allowed him, because this would be to impeach in an improper court a sentence given in a proper court.

Hob. 121, 288; *Cro. Ja.* 430, *Searl's Case*; *Comp. Incumb.* 53, 54.

So, where a libel was exhibited in the ecclesiastical court against a woman *causâ jactitationis maritagi*, and she suggested, that the person libelling was indicted at the sessions in the Old Bailey for marrying her, he then having a wife living, *contrâ formam statuti*, and that he was thereupon convicted, and had judgment to be burnt in the hand; that being tried by a jury and a court which had a jurisdiction of the cause, and the marriage found, a prohibition was prayed and granted.

3 *Mod.* 164, *Boyle v. Boyle*.

If a matter of ecclesiastical cognisance be made felony or treason by act of parliament, the spiritual courts (unless there be a saving of their juris-

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diction in such statute) cannot take cognisance thereof, nor of any defamation in relation thereto.

Jon. 320.

A layman forges orders, and obtains a benefice, for which he is prosecuted in the ecclesiastical court in order to deprivation; and he prays a prohibition, because forgery is triable at common law; but the prohibition was denied, for the forgery is touching an ecclesiastical matter, and he is suable there for it in order to his deprivation only.

Lev. 138; Sid. 217; Keb. 721, 762, Slader v. Smalbroke.

¶ By 27 Geo. 3, c. 44, § 2, no suit shall be commenced in any ecclesiastical court for fornication or incontinence, or for striking or brawling in any church or churchyard, after the expiration of eight calendar months from the time of the offence. This statute is held not to apply to proceedings for deprivation of the clerk on the ground of fornication; and therefore where a suit was instituted in the spiritual court against a clerk, charging (among other things) fornication committed more than eight months before the commencement of the suit, a prohibition was directed as to proceeding for reformation of manners, but a consultation was awarded as to proceeding for deprivation.

Free v. Burgoyne, 5 Barn. & C. 400.¶

If the spiritual court proceeds against a man for writing a libel, a prohibition lies; for this is an offence indictable at common law.

Comb. 71.

The ecclesiastical courts cannot punish or hold plea *pro reformatione morum* in case of legal perjury, or *pro lesione fidei* in a temporal matter; as, that the party will pay a debt, make a feoffment, &c. So, if a jury give a false verdict, they cannot be punished for this in the ecclesiastical courts.

F. N. B. 42; 2 Roll. Abr. 304.

But, for perjury in their own courts, and in matters in which they have cognisance, as matrimony, tithes, testaments, &c., they may punish and no prohibition lies.

Jenk. 184; Keilw. 39, pl. 5.

If a presentment be made by the churchwardens of a parish in the ecclesiastical court, that J S, a parishioner, is a railer and sower of discord among the neighbours, a prohibition lies; for this belongs to the leet, and not to this court, unless it was in the church, or suchlike.

2 Roll. Abr. 286; Hob. 246; Hetl. 132.

4. Where the Ecclesiastical Courts determine on Acts of Parliament.

The construction of acts of parliament is of temporal cognisance; so that if the spiritual courts expound them in a different sense than they ought to do, a prohibition lies; as, if upon the statute 32 H. 8, c. 38, which only prohibits marriages within the Levitical degrees, the ecclesiastical courts should molest or call in question marriages without those degrees, a prohibition lies; because they act contrary to that which is declared to be lawful by the statutes of the realm. But, where they are not bounded by any law, their jurisdiction still continues, and therefore within the Levitical degrees they are still judges of incest.

4 Leon. 16; Vaugh. 206; 2 Inst. 614, 618; 2 Lev. 64. ¶ Vide 5 East, 345; 3 Ibid. 472.¶

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So, if it be made a question in the ecclesiastical court, Whether the words of the statute 25 H. 8, c. 22, have given sufficient power to the archbishop to grant marriage licenses, and they determine against the power, a prohibition lies; for by this they determine against an act of parliament, which is a temporal affair: but, if they allow the power, they may determine as to the form of the license, the notice, and other circumstances requisite, &c.; for in these they have a jurisdiction, as such licenses have been, and still are, notwithstanding this statute, of ecclesiastical cognisance.

Jon. 259, 260.

If an administration is granted to the next of blood, and upon this an appeal is sued to the delegates, and there they intend to revoke the said sentence, and to grant it to another, who is not nearer of blood by our law, but is by the ecclesiastical law; a prohibition lies: because this being ordained by statute ought to be interpreted according to our law.

2 Roll. Abr. 303.

If there be a controversy, whether a person hath disposed of the guardianship of his child pursuant to the statute 12 Car. 2, c. 24, or whether he hath revoked such disposition; this cannot be determined in the ecclesiastical courts.

Vent. 207; Lady Chester's case, 3 Keb. 30.

On a motion for a prohibition to the ecclesiastical court to stay a suit there against a person for brawling in the belfry, and striking a man there, the statute of 5 & 6 E. 6, c. 4, was suggested; and it was alleged, that all statutes are construable by the common law, and that the person striking was mayor of the town, and that he came there to suppress a riot: but (*absente* Holt) the prohibition was denied; because this offence was conusable in the ecclesiastical court before this statute *ratione loci*; and the statute, though it provides a penalty, does not alter the jurisdiction.

2 Ld. Raym. 850, Weymouth v. Collins. || See *Ex parte* Williams, 4 Barn. & C. 313; 6 Dow. & Ry. 373.||

The defendant was presented in the ecclesiastical court for working upon holidays, viz., carrying hay on St. John Baptist's day in church-time; but a prohibition was granted, because this was out of the statute by the very words of the act 5 & 6 E. 6, c. 3, it being a work of necessity; and this being an holiday by act of parliament, it belongs to the judges of the common law to determine whether it was broken or not.

Godb. 218, Wheeler's case.

5. In what Cases they have a concurrent Jurisdiction, and may determine Incidents.

The ecclesiastical courts have in some instances a concurrent jurisdiction with the temporal courts; as, in laying violent hands on a clerk, (a) a pension by prescription, &c. So that, if a clergyman be beaten, an action at law lies for the battery; as also a suit in the spiritual court for irreverence to his character. But such proceedings in the ecclesiastical court must be *pro salute animæ*, and to punish the sin, not to recover damages.

2 Inst. 492; 9 E. 2, *Articuli Cleri*; Cro. Eliz. 655; 6 Mod. 156. Vide 4 Co. 20 a, in the Abbot of St. Alban's case. (a) Vent. 3, 120, 265; Ld. Raym. 578; 2 Salk. 550, pl. 10; 6 Mod. 252.

But if a clerk be arrested by (b) process of law, he cannot for this sue in the ecclesiastical court.

Bro. *Prohibition*, pl. 21; 2 Inst. 492. (b) If a person be proceeded against for de

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famation in the spiritual court, for giving evidence in a court of justice, he may have a prohibition. Bro. *Prohibition*, 21; 2 Bulst. 296; Roll. R. 61.—Cook sued Webb in the spiritual court for saying that he had a *bastard*; Webb, the defendant, alleged in the spiritual court, that the plaintiff was adjudged the reputed father of a bastard by two justices of peace, according to the statute, whereupon he spoke these words, and they of the spiritual court accepted his confession, but would not allow his justification, wherefore he prayed a prohibition; which was granted him. Cro. Ja. 535, Webb v. Cook.

So, if a clergyman be only assaulted, no remedy is to be had in the spiritual court, but in the common law courts.

Cro. Eliz. 753, Prynne's case.

So, if one be sued in the ecclesiastical courts for laying violent hands on a clergyman; the party being an officer or constable may (a) suggest, that the plaintiff made an affray upon another, and that he, to preserve the peace, laid hands on him, and so have a prohibition.

2 Inst. 608. (a) On the statute 5 & 6 E. 6, c. 4, against brawling, &c., in a church or churchyard, it hath been held, that he who strikes another in a church or churchyard cannot justify or excuse himself by showing that the other assaulted him. Cro. Ja. 367.—But in laying hands on a clerk in any other place he may justify. Moor, 915; Cro. Eliz. 655.

Also it is said, that though the crime of laying violent hands on a clergyman be within the express words of the statute of *circumspecte agatis*, that yet the party is not punishable in the spiritual court before he is found guilty in a temporal court; and that if he be proceeded against sooner, a prohibition lies.

7 Mod. 80.

In case of criminal conversation with a man's wife, an action lies at common law, in which the husband recovers damages, and the offender is likewise punishable in the ecclesiastical court for adultery.

Cro. Car. 89; Cro. Ja. 538; Jon. 440.

So, in case of a lewd woman who hath a bastard chargeable on the parish, though by the statute 7 Jac. 1, c. 4, she is to be sent to the house of correction, yet she may be proceeded against for incontinency in the spiritual court.

7 Mod. 80.

The defendant libelled against plaintiff in the ecclesiastical court, for having solicited the chastity of his wife, after the plaintiff had been indicted for an assault upon the same woman, with an intent to ravish her, and convicted and fined upon it; and after an action of assault and battery against him for the same offence, which action was depending at the same time that the prosecution was in the spiritual court; and all this matter appearing on the pleadings, the question was, Whether a prohibition should go to stay the proceedings in the ecclesiastical court, or a consultation should be awarded? and it was held in this case, that a prohibition should be granted; for that this being an attempt and solicitation to incontinence, coupled with force and violence, it did by reason of the force, which is temporal, become a temporal crime *in toto*.

2 Salk. 552; 7 Mod. 79, Galizard and Rigault; and 2 Ld. Raym. 809, S. C.; where it is said that the court was of this opinion; but at the prayer of the defendant's counsel they ordered that it should be argued by civilians; but afterwards, an apparent fault being in the pleadings, they refused to hear the civilians, and gave judgment that the prohibition should stand.

So, if A calls B *whore* and *thief*, the action shall be sued at common

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law; and B cannot libel against A in the spiritual court for the word *whore*, and have an action at law for the word *thief*.

2 Roll. Abr. 295; 2 Ld. Raym. 809.—So, if A says of B: *You are a bawdy, and thou keepest a bawdy-house*; the keeping a bawdy-house being a matter indictable at common law, makes the whole of temporal cognisance; but calling *whore* or *bawdy* only are punishable in the ecclesiastical courts. 2 Salk. 552, pl. 13; 2 Ld. Raym. 809; et vide 2 Inst. 488, where Lord Coke, *Mere spiritualia sunt quæ non habent mixturam temporalium*.

But on a motion for a prohibition for saying of a parson that *he preaches nothing but lies and malice in the pulpit*, on suggestion that these words were actionable at common law, the court refused to grant it; for that these words concerning and relating to an ecclesiastical person and an ecclesiastical matter, it was fit to be tried there.

3 Lev. 17, Crandon v. Walden.

So, where the words were, *You are known by the name of bawdy Nell, and do live with another woman's husband*; and an action being brought at law for these words, grounded on a special damage sustained by the defendant's speaking them, and also a suit in the ecclesiastical court, it was moved for a prohibition; for being actionable at law by reason of the special damage, the party ought not to be twice punished for the same offence; but the court refused to grant a prohibition.

2 Ld. Raym. 1101, Evans v. Brown.

If there be a mutual contract of marriage between a man and a woman *per verba de futuro*, and either of them refuse; for this breach of contract an action lies at common law for the temporal loss to the party, although there might have been a remedy in the ecclesiastical courts for enforcing such contract.(a)

Salk. 24, pl. 6, 120; 6 Mod. 155, 172; Ld. Raym. 386. See 12 Mod. 214. (a) No suit now in the ecclesiastical courts to compel marriage by reason of any contract, &c., 26 G. 2, c. 23, § 13.

If the churchwardens take away the bells of a church, they may be proceeded against in the ecclesiastical courts for such sacrilegious taking; and the rather, as they are churchwardens, (b) although an action lies against them at common law by their successors; and the remedy in this case is said to be most proper in the spiritual court, because at common law damages only are recovered, but in the ecclesiastical court they decree a restitution of the thing in *specie*.

Carth. 467; 5 Mod. 411; Sid. 281, Welcome v. Lake. (b) It is said in 2 Salk. 547, pl. 2, that a prohibition was granted to stay a suit in the ecclesiastical court for taking away two bells out of the steeple, for these reasons, that the churchwarden is a corporation and the property is in him, and he may bring trover at common law; et vide 2 Inst. 492; Roll. R. 255. ¶Vide 4 Term R. 351.¶

J S sued his brother, whom his father made executor, for his reasonable part of the goods of the father, in the spiritual court, according to the custom of the province of York; upon which a prohibition was moved for, and it was insisted, that this was a temporal cause founded upon a custom, and that there was an original form in the register, by which it appeared that it was a matter conusable at common law: but it was holden by three judges, in the absence of Hale, that in this case both courts had a concurrent jurisdiction.(c)

2 Lev. 128, Trafford v. Trafford. (c) Where in matters of legacies the courts of equity and ecclesiastical courts have a concurrent jurisdiction, vide 2 Vern. 47; 2 Vent. 362; Prec. Chan. 546.

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If a parish clerk be guilty of several scandalous offences, which are punishable at common law, yet he may be proceeded against in the spiritual court in order to a deprivation, though his office be for life.

2 Ld. Raym. 1506; Fitzg. 189.

It is laid down as a rule in a great variety of cases, that the ecclesiastical courts having cognisance of the principal thing, they shall have it of incidents and accessories. But this hath been understood in this manner, that if such incident matter be merely temporal, or if a temporal matter be pleaded in bar to an ecclesiastical demand, they must proceed in the ecclesiastical court, according to the temporal law, otherwise they will be prohibited.

2 Inst. 493, 613; 12 Co. 65; 2 Bulst. 227; Cro. Eliz. 66; Hob. 12; Hetl. 87; 2 Roll. Abr. 298; Sid. 89, 161; Cro. Ja. 269; Ld. Raym. 73.

As, if a release be pleaded to a demand of tithes, or payment in bar of a legacy, which can only be proved by one witness, and for this reason is rejected by the ecclesiastical courts, because their law requires two witnesses; there a prohibition will be granted.

2 Roll. R. 42; Godb. 272; Cro. Eliz. 666; Hob. 188, 247; Latch. 217; Noy, 12; Moor, 413; Vent. 291; Sid. 161; Show. 158; Carth. 142; 2 Salk. 547, pl. 1; Ld. Raym. 220; 3 Mod. 283; Comb. 160; Holt, 752, pl. 1.

So, although tithes, oblations, mortuaries, and pensions are of ecclesiastical consueance, yet, if to a demand of these a *modus*(a) or custom is pleaded, such custom, like all others, must be determined in the temporal courts; and (b) if the ecclesiastical courts take upon them to determine it, a prohibition will lie.

2 Inst. 653; Latch, 48; 2 Lev. 63; 3 Bulst. 231; Rol. Rep. 419; 2 Co. 45. (a) But if a *modus* be there pleaded and admitted, no prohibition shall go; *secus*, if the question be, *Modus* or no *modus*. 2 Salk. 551, pl. 13, *Per* Holt, C. J.—If they agree in the *modus*, and only vary in the manner of payment, no cause for a prohibition. Winch. 33. [So, a prohibition shall not go to stay a suit for a mortuary, unless the custom hath been denied in the spiritual court. *Johnson v. Oldham*, 1 Ld. Raym. 609; 12 Mod. 416, S. C. (b) Churchwardens libel against the rector, that there hath been time out of mind, and is, a chapel of ease within the parish: and that the rector of the parish, time out of mind, hath repaired and ought to repair the chancel of the said chapel; and that the chancel being out of repair, the defendant, being rector, hath not repaired it. The rector denied the custom in the spiritual court, and a decree was made for the rector, that there was no such custom, and costs were taxed there for the rector. The churchwardens moved for a prohibition; and it was argued for the prohibition, that it ought to be granted, because it appears that the libel is upon a custom, which the defendant hath denied; and it may be, the question was in the spiritual court, custom or not, which is not triable there, but at the common law; and then this appearing upon the libel, that the court hath no jurisdiction, a prohibition may be granted after sentence. But all the court held the contrary. For by Holt, C. J.—The reason for which the spiritual court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those which the common law hath; for in some cases the usage of ten years, in some twenty, in some thirty years, make a custom in the spiritual court; whereas by the common law it must be for time immemorial. And therefore, since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in many cases the inheritances of persons may be bound. But in this case that reason fails; for the spiritual court is so far from adjudging that there is any such custom which the common law allows, that they have adjudged that there hath not been any custom allowed by their law, which allows a less time than the common law to make a custom. And the plaintiffs having grounded their libel upon a custom, which was well grounded if the custom had not been denied, (for libels there may be upon customs,) but the custom being denied and found no custom, it is not reason to prohibit the court in executing their sentence against the plaintiffs: for the design of the motion for a prohibition is

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only to excuse the plaintiffs from costs. And there is no reason but that they ought to pay them; since it appears that they have vexed the defendant without cause. *Churchwardens of Market Bosworth v. The Rector of Market Bosworth*, 1 *Ld. Raym.* 435.—The vicar of N was libelled against in the spiritual court, for that by custom out of mind, the vicars of N had, by themselves or others, said and performed divine service in the chapel of C, for which there was such a recompense, and that he neglected. The defendant came for a prohibition, and without traversing this custom suggested, that all customs were triable at common law. And it was urged, that it was enough for a prohibition that a custom appeared to charge the vicar with a duty for which he was not liable of common right. But by Holt, C. J.—A parson may be bound to an ecclesiastical duty by custom, and when he is bound by custom the spiritual court may punish him if he neglects that duty: the custom might have a reasonable commencement by composition in the spiritual court, and begin by an ecclesiastical act: and a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here it is an ecclesiastical right, an ecclesiastical person, and an ecclesiastical duty, and the prescription not denied. *Jones v. Stone*, 1 *Ld. Raym.* 578; 2 *Salk.* 550, S. C. And if the subject of the suit be within the jurisdiction of the spiritual court, the mere suggestion of a custom in the pleadings there, if they do not go on to try it, will be no ground for a prohibition. *Dutens v. Robson*, 1 *H. Black.* 100; 11 *Barn. & C.* 21.]

But if there be but one witness to prove a nuncupative will, and the ecclesiastical court refuse the probate thereof, because to every such will the law requires two witnesses, no prohibition lies, because there is no other way of authenticating such will but in the spiritual court.

Carth. 143.

So, where the churchwardens libelled for a church-rate, which was sentenced against them, and then they appealed to the metropolitan, but pending the appeal one of the appellants released to the appellee all actions, suits, and demands, but the other appellant proceeded in his and his partner's name to reverse the sentence; whereupon the appellee prayed a prohibition: it was adjudged that no prohibition lay; for the principal matter being of ecclesiastical cognisance, things dependent thereon will be so too; and whether this release will bar both the churchwardens is what they are to determine, and not the Court of B. R.

Yelv. 172; *Noy*, 129; *Cro. Ja.* 234, *Starkey v. Barton and Gore*.

A libel was exhibited on a custom, that the constable of the town should collect the rates assessed for repairing the parish church; which he refused to do; and on a motion for a prohibition, it was suggested, that it was not triable there, whether the party was constable and duly elected or not; but the court denied to grant one, because this matter is pleadable there, and prohibitions ought not to go unless, upon a trial of the matter, their law and proceedings cross the common law, and in that case a prohibition lies only till trial here, and after that a consultation shall be granted.

Hard. 510, *Goddin v. Wainwright*.

But it hath been resolved, that if a feme covert sue another in the spiritual court for incontinence with her husband, and recover costs, if the husband release them the wife is barred; for since the husband is liable to the charges of the suit expended by the wife, he shall have the costs in recompense; besides, the wife cannot have a chattel interest exclusive of her husband.

5 *Mod.* 69; *Salk.* 115, pl. 4; *Ld. Raym.* 73, *Chamberlain v. Hewitson*. See 12 *Mod.* 891.

But, if the husband and wife are divorced *a mensa et thoro*, and the wife has alimony allowed her, and she sues for defamation, or other injury,

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and recovers costs, the husband releases them, yet the wife shall recover them; because they come instead of that she has expended out of her alimony, which was a separate maintenance, and not in the power of the husband.

Ld. Raym. 74, *per curiam*.

(M) The Offence of disobeying a Prohibition.

THE disobeying of a prohibition is a contempt to the superior court that awards it, and punishable by attachment, which issues against the judge and party (*a*) for proceeding after such prohibition, and for which they are subject to fine and imprisonment, according to the discretion of the superior court.

F. N. B. 40; Bro. *Att.*; Bro. pl. 5, pl. 9, pl. 11; And. 279. (*a*) Though the writ of prohibition was not directed to the party. 19 H. 6, 54.—And such attachment may be awarded against a peer of the realm. 21 E. 3, 3, pl. 7, 2.

An attachment was granted, upon affidavit, that the party proceeded after a prohibition delivered to him, in a suit for a seat in a church which the plaintiff claimed by prescription; and upon his appearance and examination upon interrogatories he confessed the matter, and was fined five marks.

2 Jon. 46, Dr. Wainwright's case.

And not only an attachment lies for proceeding in the same cause pending a prohibition, but also for instituting a new suit for the same thing; as, if a parson libels for tithes, and a prohibition is brought, and he libels for tithes of another year, the first not being determined, an attachment shall be awarded.

Moor, 599; Leon. 111.

In an attachment upon a prohibition, the plaintiff shall recover damages and costs against the party for proceeding after the writ of prohibition awarded.

Cro. Car. 559; 2 Jon. 128; Vent. 348; 3 Lev. 360.

¶A proceeding on a bail-bond in the marshalsea court, assigned, according to the practice of that court, to one of the officers, is not a proceeding in contempt of a prohibition from chancery restraining the original action.

Iveson v. Harris, 7 Ves. 251.

Whether a prohibition issue providently or improvidently, until it is superseded a proceeding in breach of it is a contempt.¶

^a Vide title "INJUNCTION," vol. 5.*g*

RELEASE.

A RELEASE is the giving or discharging of a right of action which a man hath or may claim against another, or that which is his; or, it is the conveyance of a man's interest or right which he hath to a thing to another who hath possession (a) thereof, or some estate therein. (b)

(a) But it is contrary to the nature of a release to give possession. 4 Co. 25; Hutt. 65.—And therefore one tenant in common cannot release to his companion, because they have distinct freeholds. Co. Lit. 200. (b) A release cannot operate but upon an estate, interest, or right. Roll. Rep. 197.

Releases are distinguished into express releases, or releases in deed, and those arising by operation of law; and are made of lands and tenements, goods and chattels, or of actions, real, personal, and mixed.

Co. Lit. 264 a.

These are to be adapted to the nature of the case, and the purposes for which the release is intended; so that if a man be disseised of lands, or dispossessed of goods, and release all actions, he may, notwithstanding, enter into his lands, or retake his goods, the right and property being still in him, though he has divested himself of his remedy.

Hob. 163; 4 Co. 63.

So, where a man has divers means to come to his right, he may release one, and yet take advantage of the other: but if a man has not any means to come to his right but by way of action, there by a release of all actions his right by judgment of law is gone, because by his own act he has barred himself of all means to come at it.

8 Co. 152; Co. Lit. 286.

Heretofore releases were construed with much nicety and great strictness, and being considered as the deed or grant of the party, were, according to the rule of law, taken strongest against the releasor. They now, however, receive such interpretation as other grants and agreements do, and are favoured by the judges as tending to repose and quietness.

Dyer, 56, 57 a; Plow. 289; Hetl. 15; 8 Co. 148; Show. 154.

Hence it hath been established as a general rule in the construction of releases, that when there are general words only in a release, they shall be taken most strongly against the releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words.

Mod. 99; Ld. Raym. 235; 31 Cowen, 122; 1 Edw. Eq. 34.g

For the better understanding hereof we shall consider,

(A) Releases that are express and by Deed: And herein,

1. *Of the Words and Ceremony requisite in an express Release.*
2. *How far a Covenant or Agreement may operate as a Defeasance or Release.*
3. *How far a Disposition by Will may operate as a Release.*

(B) Release by Operation of Law, how created, and the Effect thereof.

(A) Releases that are express and by Deed.

(C) Releases of Lands and Hereditaments, how they inure: And herein,

1. *Of Releases that inure by way of Mitter le Estate.*

2. *Releases by way of Mitter le Droit.*

3. *Releases that inure by way of Extinguishment.*

4. *Releases that inure by way of Enlargement: And therein, of the modern Manner of Conveyancing by Lease and Release.*

5. *What Estate or Interest passes by the Release: And therein, of the Words requisite to an Enlargement.*

(D) Who in respect of their Right and Interest are capable of releasing.

(E) Of Releases by Executors and Administrators.

(F) How far the Husband's Release shall bind the Wife.

(G) To whose Benefit a Release shall inure; and who shall be bound thereby, though not a Party to the Release.

(H) How far a Possibility or Contingent Interest may be released.

(I) How the operative Words in a Release have been construed: And therein, of the Words.

1. *Claims and Demands, what are released thereby.*

2. *By a Release of all Actions and Suits.*

(K) Release, in what Cases restrained to the special Purpose for which it was given.

(L) What Right and Interest shall be said to be released: And therein, of Misrecitals and Exceptions in Releases.

(A) Releases that are express and by Deed: And herein,

1. *Of the Words and Ceremony required in an express Release.*

LITTLETON tells us, that the proper words of a release are *remisisse, relaxasse, et quietum clamasse*, which have all the same signification. Lord Coke adds, (a) *renunciare, acquietare*; and says that there are other words which will amount to a release: as, if the lessor grants to the lessee for life, that he shall be discharged of the rent; this is a good release.

Lit. sect. 445; Co. Lit. 264. (a) Plow. 140.

So, it hath been held, that a pardon by act of parliament of all debts and judgments amounts to a release of the debt, the word *pardon* including a release.

Sid. 765.—So, the words *ei reddidit* inure as a release. Cro. Ja. 696.—So, an obligee's acknowledging himself on good consideration satisfied, or discharged of all bonds, debts, and demands, is in judgment of law a good release. 9 Co. 52; Show. 331.

β The claims of the government in an official bond are not released by the laches of the officer to whom the assertion of the claim is intrusted.

Dox v. Postmaster-general, 1 Peters, 325.

The discharge of a principal debtor from imprisonment, by the Secretary of the Treasury, does not release the sureties.

U. States v. Stansbury et al., 5 Peters, 575; Same v. Sturges et al., 1 Paine, 525.γ

An express release must regularly be in writing and by deed, according to the common rule, *eodem modo quo oritur eodem modo dissolvitur*; so that a duty arising by record must be discharged by matter of as high a nature: so of a bond or other deed.

Co. Lit. 264 b; Roll. R. 43; 2 Leon. 76, 213; 2 Roll. Abr. 408; 2 Saund. 48; Moor, 573, pl. 787

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But a promise by words may before breach be discharged or released by words only.

Sid. 177; 2 Sid. 78; Cro. Ja. 483, 620.

As where in *assumpsit* the plaintiff declared that the defendant for valuable consideration assumed to go a certain voyage in such a ship before August following, and alleged a breach in the non-performance; to which the defendant pleaded, that, before any breach, the plaintiff the fourth of April at such a place *exoneravit eum* of the said promise; on demurrer the plea was held sufficient, without showing how he discharged him, or that such discharge was in writing.

Cro. Car. 318, Langdon v. Stokes.

A release is good although no consideration has passed to the releasor.

Wentz v. Dehaven, 1 Serg. & R. 317; Coe v. Hutten, Ibid. 408; Fitch v. Forman, 14 Johns. 172; Lattimore v. Hanson, 14 Johns. 330; Wood v. Young, 5 Wend. 620. (But see Whitehill v. Wilson, 3 Penna. Rep. 405; Jackson *ex dem.* Roosevelt v. Stackhouse, 1 Cowen, 122; Miller v. Hemler, 5 Watts & S. 486; Gibson v. Weire et al., 1 J. J. Marsh. 446.)

A parol release without payment or satisfaction is no extinguishment of the debt.

Sigourney v. Sibley, 21 Pick. 101.

Where there are general words alone in a release, they shall be taken most strongly against the releasor; but where there is a particular recital, and general words, they shall be qualified by the particular recital.

Jackson v. Stackhouse, 1 Cowen, 122; McIntyre v. Williamson, 1 Edw. 34; Rich v. Lord, 18 Pick. 322; Lyman v. Clark, 9 Mass. 235; Averill v. Lyman, 18 Pick. 434; Tuckerman v. Newhall, 17 Mass. 581; Russell v. Coffin, 8 Pick. 143; Deland v. Amesbury, Man. Co., 7 Pick. 244.

Parol evidence is admissible to show what was intended to be released.

West Boyleston Man. Co. v. Searle, 15 Pick. 225, 229.

But where in *assumpsit* for 5*l.* upon exchange of a horse, to be paid upon request, the defendant pleaded that before the action brought the plaintiff did exonerate him of this agreement, this plea was resolved to be ill; for though a parol agreement may be discharged by parol before cause of action accrued, yet, after that, it cannot be discharged but by deed; and here the cause of action did accrue at least upon request, and therefore he should have pleaded the exoneration before the request.

Mod. 262; 2 Mod. 259, S. C., Edward v. Weeks.

In trespass for riding the plaintiff's horse, the defendant pleaded that such a day the plaintiff *exoneravit* him of the trespass; and this was held an ill plea, in not showing that the discharge was in writing.

Sid. 293, Westlake v. Perse.

A release of a right in chattels cannot be without deed.

Leon. 283, per Anderson, C. J.

In Pennsylvania a mortgage or judgment may be released by an instrument not under seal.

Wentz v. Dehaven, 1 Serg. & R. 317; Milliken v. Brown, 1 Rawle, 398; Whitehill v. Wilson, 3 Penn. 405.

After breach of a sealed contract the right of action may be released by parol.

Dearbon v. Cross, 7 Cowen, 48; Lattimore v. Hanson, 14 Johns. 330; Silvers v. Reynolds, 2 Harris. 275. (See Delacroix v. Bulkley, 13 Wend. 71; Harrison v. Close.

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2 Johns. 448 ; Crawford v. Millspaugh, 13 Johns. 87 ; Seymour v. Minturn, 17 Johns. 169 ; Palmer v. Green, 6 Conn. 14 ; 1 Bibb, 273, 287.)

A release which is not accepted has no effect.

Buck v. Sanders, 1 Dana, 189.

A release entered of record by a verbal direction in open court, is valid under the statute of frauds ; the clerk being considered as the agent of both parties.

Boyken v. Smith, 3 Munf. 102.g

2. How far a Covenant or Agreement may operate as a Defeasance or Release.

A covenant perpetual, as that the covenantor will not sue, without any limitation of time, is a defeasance (a) or absolute release. And this construction has been made to avoid circuitry of action ; for if in such case the party should, contrary to his covenant, sue, the other party would recover precisely the same damages which he sustained by the other's suing.(b) But if the covenant be, that he will not sue till such a time, this does not amount to a release, nor is it pleadable in bar as such, but the party hath remedy only on his covenant.

Moor, 23, pl. 80, 811 ; Roll. Abr. 939 ; Bridg. 118 ; 2 Bulst. 95, 290 ; Hard. 113 ; 3 Lev. 41 ; 2 Salk. 573, pl. 1, 575, pl. 4 ; 2 Ld. Raym. 786 ; Carth. 210 ; Ld. Raym. 419, 691 ; {2 Johns. Rep. 186, Cuyler v. Cuyler.} (a) A defeasance is only a conditional release, and may be executed as well after as at the time of the original contract. 2 Saund. 48 ; Cro. Eliz. 623. (b) Scriba v. Deanes et al., 1 Brockenb. 166 ; Garnet's Ex. v. Macon, 2 Brockenb. 185 ; Clark v. Bush, 3 Cowen, 151 ; Phelps v. Johnson, 8 Johns. 54 ; Ward v. Johnson, 1 Munf. 45 ; S. C. 6 Munf. 8 ; Jackson v. Stackhouse, 1 Cowen, 122 ; Reed v. Shaw, 1 Blackf. 245 ; Garnett v. Macon, 6 Call. 308 ; Crane v. Alling, 3 Green, 423 ; Hastings v. Dickinson, 7 Mass. 153 ; Shed v. Pierce, 17 Mass. 623 ; Sewall v. Sparrow, 16 Mass. 24 ; Upham v. Smith, 7 Mass. 265 ; Ruggles v. Patten, 8 Mass. 480.g

As in debt upon an obligation the defendant pleaded that the plaintiff by indenture, &c., did covenant that he would not sue the bond before Michaelmas, intending thereby that this was a suspension of the action, and consequently a release ; but upon demurrer the court adjudged, that it only amounted to a covenant, and that for breach thereof an action of covenant would lie.

Cro. Eliz. 352 ; And. 307 ; Roll. Abr. 939, Deux v. Jefferies.

So, if the obligee covenants and grants to and with the obligor, that during ninety-nine years he will not put the bond in suit ; this is only a covenant on which an action will lie, but it cannot be pleaded in bar of the bond.

Carth. 63 ; Salk. 573, pl. 1, Ailoffe v. Scrimshire ; and vide Show. 46, S. C. ; Rowley v. Stoddart, 7 Johns. 207 ; Chandler v. Herrick, 19 Johns. 129 ; Clopper v. Union Bank, 7 Harr. & J. 103 ; Berry v. Bates, 2 Blackf. 119 ; Palmer v. Green, 6 Conn. 14 ; Perkins v. Gilman, 8 Pick. 229.g

§ A covenant to suspend proceedings on a judgment until, &c., is not a release of the judgment.

Scriba v. Deans et al., 1 Brockenb. 166.

A parol release of a judgment may be enforced in equity as an agreement not to sue, provided there be a consideration.

Whitehill v. Wilson, 3 Penna. R. 405.

A bond not to sue unless in a future contract, amounts to a release of existing claims.

Cuyler v. Cuyler, 2 Johns. 186 ; Jackson v. Stackhouse, 1 Cowen, 122 ; Lindo v. Lindo, 1 Beav. 496 ; Crane v. Alling, 3 Green, 423.g

(A) Releases that are express and by Deed.

|| So, also, a covenant not to sue on a bond during the life of the obligor, and that if any person to whom the obligee should assign the bond should recover the principal, the obligee would pay the obligor interest during his life on the amount recovered, was held no bar to an action by an assignee of the bond in the name of the obligee, since such covenant did not amount to a release.

Morley v. Freer, 6 Bing. 547.

So, also, if the covenant be conditional and the condition not performed; as where a creditor covenanted (in an assignment of effects to trustees for creditors) not to sue the debtor if the trustees fairly accounted for the effects, and the trustees refused to account, the covenant was held not a release of the debts.

Kesterton v. Savery, 2 Chitt. 541.||

If two are jointly and severally bound in an obligation, and the obligee by deed (a) covenants and agrees not to sue one of them; this is no release, and he may notwithstanding sue the other.

Cro. Car. 551; March, 95; 2 Salk. 575, pl. 3; Ld. Raym. 688. See 12 Mod. 415, 448, 550, 551; {8 Term, 168; Dean v. Newhall, 2 Johns. Rep. 448; Harrison v. Close & Wilcox, 2 Saund. 48 a, note (1) by Serj. Williams.} But if two are jointly and severally bound in a bond, a release to the one discharges the other. Ld. Raym. 420; 2 Jay v. Wurtz, 2 Wash. C. C. R. 269; Willings v. Consequa, 1 Peters, C. C. R. 303; United States v. Thompson, 1 Gilpin, 621; Griffith v. Chew, 8 S. & R. 17; Eichlberger v. Morris, 6 Watts, 42; Milliken v. Brown, 1 Rawle, 391; Burson v. Kincaid, 3 Penna. 60; Hostetter v. Kaufman, 11 Serg. and R. 149; Averhill v. Lyman, 18 Pick. 346; Rowley v. Stoddart, 7 Johns. 207. (See Harrison v. Close, 2 Johns. 448.) Catskill Bank v. Messenger, 9 Cowen, 37; Tuckerman v. Newhall, 17 Mass. 581; Cocks v. Nash, 4 M. & Scott, 162; Horine v. Wood, Pr. Dec. 277; Crane v. Alling, 3 Green, 423; Am. Bank v. Doolittle, 14 Pick. 123; Goodnow v. Smith, 18 Pick. 414; Wiggin v. Tudor, 23 Pick. 434; Carnegie v. Morrison, 2 Met. 381; Ward v. Johnson, 13 Mass. 148. A receipt in full to one joint obligor on his paying his proportion of the debt, is not a discharge of the others. Chandler v. Herrick, 19 Wend. 129. || But a covenant not to sue one is not a release, and does not discharge the other. Dean v. Newhall, 8 Term R. 168; Hutton v. Eyre, 6 Taunt. 289, and see Twopenny v. Young, 3 Barn. & C. 208; || 2 Garnet's Exec. v. Macon et al., 2 Brockenb. 125. De Zeng v. Bailly, 9 Wend. 336; Bank of Chenango v. Osgood et al., 4 Wend. 607; Catskill Bank v. Messenger, 9 Cowen, 37; Rowley v. Stoddart, 7 Johns. 207; Chandler v. Herrick, 19 Johns. 129; Harrison v. Close, 2 Johns. 448; Tuckerman v. Newhall, 17 Mass. 581; Ward v. Johnson, 6 Munf. 8; Gibson v. Weire, 1 J. J. Marshall, 446; Lane v. Owens, 3 Bibb, 247; Shotwell v. Miller, Cox, 81; Shed v. Peirce, 17 Mass. 623; Sewall v. Sparrow, 16 Mass. 24; Ruggles v. Patten, 2 Mass. 480. What release to one will discharge the rest of several obligors and *e contra*, see Garnett v. Macon, 6 Call, 308; Clagett v. Salmon, 5 Gill. & Johns. 314. A bond of indemnity to one of two joint and several obligees, in receiving payment of his half of the debt, is not a discharge of the other. Shotwell v. Miller, Cox, 81. A promise by the holder of a joint and several note to one of the makers who had made part payment, that he would look to the other for payment of the balance, is without consideration, and no defence to an action against the one to whom the promise was made, to recover the balance. Smith v. Bartholemew, 1 Met. 276. A release to the principal debtor discharges the endorers, but a release to the endorers on receiving part payment is no discharge of the principal debtor. Commercial Bank v. Cunningham, 24 Pick. 270. g

|| A release of one joint trustee who is not in default, is not a release of his co-trustees.

Kirby v. Turner, Hopk. 309; S. C., 6 Johns. Ch. 242.

A release of a joint debtor with the consent of his co-debtor, does not discharge the debt.

Rogers v. Hosack's Exrs., 18 Wend. 319.

Although at law a release to one of two joint debtors release both, yet

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equity will not give the release an operation beyond the intention of the parties and the justice of the case.

Clagett v. Salmon, 5 Gill & Johns. 314.

A release by operation of law of one joint debtor without any act or co-operation of the creditor does not release the remaining debtors.

Ward v. Johnson, 13 Mass. 148.

It must be a technical release, under seal.

Shaw v. Pratt, 22 Pick. 305; Smith v. Bartholemew, 1 Met. 276.*g*

A covenants with B to pay him 300*l.* for the use of the wife of A only for her life; in covenant brought on this, and breach assigned that there was so much of the 300*l.* arrear, defendant pleads that there was another indenture between him and the plaintiff since the date or delivery of the deed of covenant declared in, reciting the said covenant and agreement for the payment of the 300*l.*, wherein it was covenanted and agreed, that so long as A and his wife did cohabit, the payment of the 300*l.* should cease; and avers, that they did cohabit for the time the said arrear became due, and pleads this in bar of the first agreement; and though in this case there could not have been any great mischief in construing the deed pleaded a defeasance or release, there being no other parties to the deed; yet, as this was a sum in gross, and the covenant temporary and not perpetual, it was adjudged no bar.

2 Vent. 217, Gawden v. Draper; Ld. Raym. 691, S. C., cited *per* Holt, and admitted to be good law; but he said, that if the 300*l.* had been a rent, he should have been of opinion that the second deed would have amounted to a grant of the rent for the said time; and vide Lev. 152.

If the collateral ancestor of the disseisee release to the disseisor with warranty, and the disseisor make a deed reciting the release with warranty, and covenant, though he be impleaded or ousted, yet he will not take advantage of the deed or warranty, that is a defeasance; and if the disseisor plead the release with warranty in bar of an action brought by the disseisee, he shall be rebutted from the warranty by his own deed. But in this case if the disseisor had covenanted only not to bring a *warrantia chartæ*, or not to vouch, there it would only have been a covenant, because there would have remained a remedy upon the warranty.

43 Ass. pl. 44; Co. Lit. 265; Ld. Raym. 690, cited.

A having a rent-charge issuing out of three acres, B purchased two acres thereof, and A covenanted and granted to and with B not to distrain in those two acres for the rent. By Glanvil it was held a release; but Anderson *contra*; but *per cur.*—If it be a release, the tenant of the other acre may plead it, for thereby the rent was extinct.

Noy, 5.

Where a portion of a lot of ground subject to an annual rent-charge was taken for public use, and a portion of the damages paid to the owner of the rent; it was held, that the rent was apportioned and reduced in proportion to the quantity of the lot taken for public use.

Cuthburt v. Kuhn, 3 Whart. 357.

A release of a part of land out of which a ground-rent issues, does not extinguish the whole rent, but leaves the remainder subject to its due proportion.

Ingersoll v. Sergeant, 1 Whart. 337.

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Where a mortgagee whose mortgage was a lien on two parcels of land, subsequently sold by the mortgagor to different persons, releases the parcel last sold, without notice of the first sale, he does not thereby discharge the parcel not released.

Patty v. Pease, 8 Paige, 277; but see Parkman v. Welsh, 19 Pick. 231; Hicks v. Bingham, 11 Mass. 300.

If a person indebted devise his estate to several, and the creditors release the land of one of the devisees from the payment of his proportion, he cannot recover such proportion from the other devisees.

Gibson v. M'Cormick, 10 Gill. & J. 67.g

If A be bound to B in a certain sum, and B covenant and grant with C, a stranger to the bond, that if A do such a thing the obligation shall be void; this does not amount to a release:

Bro. *Estranger al Fuit*, pl. 21.

|| And a deed *inter partes* cannot operate as a release to a stranger. Therefore a charter-party made between A and B in consideration of a former charter-party between A and C, which former charter-party, in consideration of the freight B was to pay, was thereby declared null and void; A agreeing to cancel the first in consideration of the second, and C being thereby acquitted of all claims which A might have against him in virtue of the first charter-party, was held not to operate as a release from A to C of the first charter-party.

Storer v. Gordon, 3 Maule & S. 308; and see Carstairs v. Rolleston, 5 Taunt. 551.||

If a letter of license contain the following words, viz., that if the creditor sue within such a time his debts shall be forfeited, such license is pleadable in bar as a release; for the words, *shall be forfeited*, make an absolute defeasance upon a suit commenced.

Carth. 64, 210; Show. 46, 330, 350; 2 Show. 446.

Obligee reciting the bond covenants to save the obligor harmless; it is an absolute release; and if upon a contingency, it is a conditional release, because it has an express relation to the bond.

2 Salk. 573, pl. 2; β Clark v. Bush, 3 Cowen, 151; Lane et al. v. Owings, 3 Bibb, 247; Peddicord v. Hill's admr., 4 Monr. 373; Garnett v. Macon, 6 Call. 308. But a bond given by one of several partners to a debtor of the firm, to save him harmless, cannot be pleaded as a release or given in evidence in action by the firm. Emerson v. Bailis, 19 Pick. 55.g •

An award that all suits shall cease hath the effect of a release, and the submission and award may be pleaded in discharge as well as a release.

2 Mod. 228, Strangford v. Green; β Cox v. Jagger, 2 Cowen, 638; Shepherd v. Ryers, 15 Johns. 497; Hepburn et al. v. Auld, 1 Cranch, 332.g

β On an award directing each party to release to the other within a given time, neither party can insist upon a release, without offering to execute one on his part.

M'Neil v. Magee, 5 Sumner, 244.g

3. How far a Disposition by Will may operate as a Release.

It seems agreed, that a will, though sealed and delivered, cannot amount to a release, because it is ambulatory and revocable during the testator's life; also by reason of the executors' consent requisite to every disposition of a personal thing by will, and the injury that might accrue to the testator's creditors were a will allowed to operate as a release.

Stil. 286; Vent. 39.

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And therefore where in debt upon an obligation, by the representative of a testator, the defendant pleaded, that the testator by his last will in writing released to the defendant, this was adjudged ill, and that no advantage could be taken hereof by plea.

Sid. 421, *Pidgeon v. Harrison*.

But it hath been held in equity, that though a will cannot inure as a release, yet, provided it were expressed to be the intention of the testator that the debt should be discharged, the will would operate accordingly; and Lord Cowper said, that in such case it would be plainly an absolute discharge of the debt though the testator had survived the legatee.

1 P. Wms. 83, pl. 16, *Elliot v. Davenport*; 2 Vern. 721, S. C. [See 3 Atk. 581.]

So, in another case, it was held by Lord King, that a release by will can only operate as a legacy, and must be assets to pay the testator's debts; and if a debt so released by will be afterwards received by the testator himself in his lifetime, the legacy is extinct, and such release by will intimates no more than that the executors shall not after the testator's death trouble or molest the debtor.

2 P. Wms. 332, pl. 95, *Rider v. Wager*. [See the cases of *Sibthorpe v. Moxom*, and *Toplis v. Baker*, vol. vi. p. 237.]

A devised to his servant B a legacy of 50*l.* and 20*l.* *per ann.* for his life; and by his will acquits, exonerates, and discharges B of all debts, accounts, reckonings, and demands whatsoever at the death of the testator: B had a trunk of testator's in which were medals, jewels, &c., and it was made a doubt, and directed to be tried at law, whether by these words the trunk, &c., passed or not.

2 Vern. 115, *Fish v. —*.

A devises 100*l.* to B, and by his will releases to B all debts and demands; and afterwards A lends B 100*l.*, and the question was, Whether the will should discharge the 100*l.* lent without any new publication? The court doubted; however they decreed payment of the 100*l.* legacy, and left the executor to recover the 100*l.* lent, if he could, at law.

2 Vent. 136, *Roberts v. Bennet*.

If a debt is mentioned to be devised to the debtor without words of release or discharge of the debt, and the debtor die before the testator, this will be a lapsed legacy, and the debt will subsist.

2 Vern. 522, admitted.

[In the will of John Adair was the following clause: "I devise to my brother, the Rev. Mr. Adair, 2000*l.* I also return him a bond for 400*l.* with interest due thereon, which he owes me." It appeared by the Master's report, that the above bond was a joint bond in the Scotch form by the testator's brother and his son. The question was, Whether this disposition of the bond by the will amounted to a release, or was only a legacy, and therefore lapsed by the death of the testator's brother in his lifetime, and the bond was still remaining in force against the co-obligor and executor of his father? Lord Chancellor—There is not the least doubt as to the bond. It is distinctly a legacy to the brother. The inquiry directed, whether it remained in the hands of Mr. Adair, shows what the court thought at the hearing. There is no foundation therefore for Thomas Adair, the son, to have the bond delivered up.

Maitland v. Adair, 3 Ves. jun. 231.] [See 2 Price, 34.]

(B) Release by Operation of Law, &c.

£ A was indebted 150*l.* on bond to B, who in her will bequeathed to A two hundred pounds in specie, "provided he brings no account against me or my estate," &c. *Dubitatur* whether this bequest operates as a release of the bond.

Massey v. Leaming, 4 Dallas, 123.

Where a creditor by will leaves a legacy to his debtor, it is not a release of the debt.

Rickets v. Livingston, 2 Johns. Ca. 97; Staggs v. Beekman, 2 Edw. Ch. 89; Ladson v. Ward, Desauss. 314; Strong v. Williams, 12 Mass. 391; Owings' Exrs. v. Owings, 1 Harr. & Gil. 484; Partridge v. Partridge, 2 Harr. & J. 63; Mulheron's Exrs. v. Gillespie, 12 Wend. 349; Clark v. Bogardus, 12 Wend. 67. But see Guignard v. Mayrant, 4 Desauss. 614; Kelly v. Kelly's Exrs., 6 Rand. 176; Williams v. Crary, 5 Cowen, 368; S. C., 8 Cow. 246; 4 Wend. 443; Ward v. Coffield, 1 Dev. Eq. 108. See title "*Legacies*," D., vol. 6, p. 210.

¶ A mere declaration by a testator to his bond debtor, that he will not sue for the money, is not sufficient to constitute a release; but if such declaration be reduced into writing, and by a testamentary paper, this may operate as a gift of the money due on the bond.

Reeves v. Brymer, 6 Ves. 519, *per* Master of the Rolls.

£ Where a father loaned a sum of money to his son for the purpose of enabling him to engage in trade, and persuaded him to continue in trade against his inclination, whereby the son suffered great losses; the father on his death-bed caused a note taken by him from the son for the amount loaned, to be burned; held, that the burning of the note amounted in equity to a release of the debt.

Gilbert v. Wetherill, 2 Sim. & Stu. 254.

A bequest of a debt to the debtor operates by way of extinguishment and release of the debt; so a bequest of the residue comprehending the debt is equivalent to an express bequest of the debt.

Hobart v. Stone, 10 Pick. 215.

(B) Release by Operation of Law, how created, and the Effect thereof.

RELEASES by operation of law are created sometimes by deed, or may be without; as, if the lord disseise the tenant, and make a feoffment in fee: or, if the disseisee disseise the disseisor's heir, and make a feoffment in fee; this is a release in law of the seignory in the first case, and both of the right and action of the disseisee in the second.

Co. Lit. 264 b.

If a disseisee release to his disseisor's lessee for life, his right is gone for ever; but if he disseise his disseisor's heir, and make a lease for life, his right is released but during the lessee's life, for a release in law is more favourably taken according to the party's intent than an express release in deed.

Co. Lit. 264, 265.

If the obligor makes the obligee his executor, and he accepts of the executorship, this in law is a release of the action,^(a) but still the debt or duty remains, for which the executor may retain, but such retainer can only be against creditors who are in an equal degree with himself.

Co. Lit. 264; Plow. 184, 185; Hutt. 128; [3 Ves. & Bea. 194.] ^(a) But if there are not assets, the action is not so much as suspended, and the executor may sue the heir of the obligor where the heir is bound. Roll. Abr. 940; Salk. 304.—So, if a

(B) Release by Operation of Law, &c.

creditor is made executor with others, he may sue the others, especially if he hath not administered. Cro. Car. 372; Jon. 345; Off. of Exec. 32. [And the bare appointment of a creditor to be executor, if he refuse to act, will not extinguish his legal remedy for the recovery of his debt. Rawlinson v. Shaw, 3 Term R. 557.]

So, if the obligee makes the obligor his executor, who administers several goods, but dies before probate, this in law is a release. So an administrator who is a creditor may retain so much of the intestate's assets as will satisfy himself. But an executor *de son tort*, who is a creditor, cannot retain, because this would be allowing him to take advantage of his own wrong.

8 Co. 136; Off. of Ex. 31; Salk. 300.

A and B are bound in an obligation jointly and severally to C, and after A makes D his executor and dies, and D takes upon him the execution of the will, and fully administers all the goods of A, and after the obligee makes the same D his executor, and dies; and the question was, Whether this was a release or extinguishment of the obligation as to B? And adjudged to be no release, because he had it in another's right.

Cro. Car. 372; Jon. 345; Roll. Abr. 934, *Dorchester v. Webb*.

Debt upon bond by the plaintiff as executor of the obligee; the defendant pleaded that the obligee made the defendant executor during the minority of the plaintiff, and that the plaintiff became executor at his age of seventeen: the plaintiff demurred. *Per cur.*—This cannot be a suspension of the action, because the defendant was only executor in trust for the plaintiff during his minority.

Ld. Raym. 605, *Caweth v. Philips*.

If A and B be jointly and severally bound to C, and A make C his executor, or (as the case was) make D his executor, who makes C his executor; in this case, if C has not received satisfaction of the assets of A he may sue B, for being jointly and severally bound, he may sue which of them he pleases.

2 Lev. 73, *Cock v. Cross*.

If an obligor administers to the obligee, and makes his executor, and dies, the creditor of the obligee may well bring an action against him.

Sid. 79.

If the obligee makes the obligor his executor, this is a release in law, in regard it is the proper act of the obligee, who thereby makes the executor the only person capable to receive and pay, &c.

8 Co. 136; Salk. 306.

§ If the obligee, in a bond given to him by a principal and surety, make the principal one of his executors, this is a release of the bond as to the principal and consequently as to the surety, but the amount of the bond is assets in the hands of the executor.

Eichelberger v. Morris, 6 Watts, 42; *Hostetter v. Kaufman*, 11 Serg. & R. 149; *Winthrop v. Bass*, 12 Mass. 199. §

But if the obligee dies intestate, and administration of the goods of the obligee is by the ordinary granted to the obligor, this does not extinguish (a) the debt, for he comes into the administration by the act of law, whereas the other is the act of the party.

8 Co. 136; Leon. 90; 2 Mod. 315. (a) But if an administrator, having no assets, pays a debt of the intestate to the value of the bond out of his own money, this will amount to a release. Salk. 306.

(B) Release by Operation of Law, &c.

If the debtee makes the debtor and another co-executors, and one of them makes his executor, and dies, the surviving co-executor shall not have an action to recover the debt against the executor of the debtor, because the debt was once extinct; for it could not be brought but in the names of both the co-executors, notwithstanding one alone administered; and it could not be brought in both their names, because the debtor could not sue himself.

Plow. 264; Leon. 320.

If the obligee makes the obligor and others his executors, and the obligor refuses, but the others administer, and the obligor dies first, yet the debt is released, for the obligor, notwithstanding the refusal, might have come in and administered, and the probate by the others was for his benefit.

Salk. 308, *per* Holt.

It is said by Ch. Just. Holt, that a creditor making his debtor executor does not operate as a legacy, or amount to a bequest to him of the sum due, but to a payment and release; the meaning whereof is, that such executor having assets sufficient to pay the debts and legacies of the testator, is discharged of the debt due from himself, as he by law is entitled to all the residue of the testator's personal estate after payment of debts and legacies. But it hath been adjudged, that in case of a deficiency of assets either for the payment of debts or legacies, such debt is to be deemed assets, and the executor accountable therewith as so much of the testator's personal estate.^(a)

Salk. 304, 306; Cro. Car. 373; Off. of Ex. 30; Yelv. 160; Chan. Ca. 292; and the case of *Selwin v. Browne*, which vide title *Executors*, vol. iv. ¶(a) See 11 Ves. 87, 90, note; 13 Ves. 264; Roper on Legacies, vol. ii. p. 67, *acc.*]

β The appointment of a debtor as executor is not an extinguishment of the debt as against creditors or legatees, but the amount will be considered as assets in his hands.

Page v. Patten, 5 Peters, 304; Pusey v. Clemson, 9 Serg. & R. 208; Eichelberger v. Morris, 6 Watts, 42; Wood v. Tallman, 1 Cox, 153; Bacon v. Fairman, 6 Conn. 121; Stevens v. Gaylord, 11 Mass. 256; Hays v. Jackson, 6 Mass. 149; Winthrop v. Bass, 12 Mass. 199; Exec. of Bigelow v. Bigelow's Admr., 4 Ohio R. 147; Marvin v. Stone, 2 Cowen, 781; Thomas v. Thompson, 2 Johns. 471; Gardiner v. Marvin, 19 Johns. 188; Hall v. Pratt, 5 Ohio R. 81; Hall v. Hall, 2 M'Cord, Ch. 304; Farys v. Farys, Harp. Eq. 261; Decker v. Miller, 2 Paige, 149; Hobart v. Stone, 10 Pick. 215.^g

[A testator bequeathed to his brother 500*l.*, and the like sum to his nephew, and appointed them his executors. The brother was indebted to the testator 7000*l.*, and the nephew was indebted to him 1000*l.*, at the time of his decease. A bill being filed by the next of kin, praying an account of the personal estate of the testator, and particularly of the sums in which the executors were indebted to him, and payment of the same to the plaintiffs; it was contended on behalf of the defendants, that the appointment of the brother and nephew executors was an extinguishment of the debt: and this was clearly so at law; and that there is no case in equity where it has been holden otherwise, except where there has been a direct gift of the residue; as in the case of *Brown v. Selwin*, Ca. temp. Talb. 240; and even there Lord Talbot spoke of it as an undecided point: but that there was no case where it had not been holden an extinguishment against the next of kin. But Lord Thurlow said he thought it had been

(B) Release by Operation of Law, &c.

a settled point in a court of equity, that the appointment of the debtor executor was no more than parting with the action; and declared it a trust for the next of kin.

Carey v. Goodinge, 3 Br. Ch. R. 110; {11 Ves. J. 87, Berry v. Usher, *acc.*}

If an infant at the age of seventeen make his debtor executor, this in law is a release; for as the law gives him power to make an executor, it gives his executor the same advantages with others.

Co. Lit. 264.

If a feme obligee marry the obligor, or one of the obligors; or if there be two feme obligees; and one of them marry the obligor; these are releases in law.

8 Co. 136; Co. Lit. 264; *β* Hostetter et al. v. Kaufman, 11 Serg. & R. 149.*g*

But if a woman, executrix of the obligee, take the debtor to husband, this is no release in law, because she hath the debt in another right; and if this amounted to a release in law it would be a *devastavit*, which is a wrong the law will not suffer.

8 Co. 136; Co. Lit. 264; Cro. Eliz. 114, S. P; adjudged that it was suspended but not extinguished, for that after the husband's death an action would lie against his executor. Moor, 236, pl. 368; Leon. 320.

If A and B are bound in an obligation jointly and severally to C, and C makes D, the wife of A, his executrix, and dies, and D administers, and after A, the husband of D, makes D his executrix, and dies, leaving sufficient assets to pay the debt, and after D dies, and E takes administration of the goods of C, the obligee not administered, yet he can have no action upon the obligation against B, the other obligor; because that when the obligor made the executrix of the obligee his executrix, and left assets, the debt was presently satisfied by way of retainer, and then by consequence no new action could be had for the debt.

2 Roll. Abr. 935; Hob. 10; Moor, 855, Frier v. Gildridge.

By an intermarriage all contracts between the husband and wife for debts due *in præsenti* or *in futuro*, or upon a contingency which may become due during the coverture, are released and extinct, because the husband and wife make but one person in law; and it is holden by Just. Gould, that if there was an express agreement that they should not be released by the intermarriage, it would be void, as inconsistent with the state of matrimony.

Co. Lit. 264; 8 Co. 136; Dyer, 140.

But it is the better opinion, and founded on a great variety of cases, that promises, covenants, and agreements for the performance of a thing which is not to happen during the coverture, as payment of money after the husband's decease, are not released by the marriage.

Hob. 216, 227; Hutt. 17; Noy, 26; Cro. Ja. 571; Palm. 99; Roll. R. 343; 2 Roll. Abr. 407; Godb. 271; 2 Roll. R. 162; Lit. R. 32; Hetl. 122; 2 Sid. 58.

Also it hath been adjudged, by two judges against Holt, C. J., that where A entered into a bond to his intended wife, conditioned to leave her at his death 1000*l.* if she survived him, that such bond was not released by the marriage, as nothing would be due during the coverture, and as it would be contrary to the express agreement of the parties. But the Ch. Just. insisted strenuously that a bond differed from a promise or covenant, being *debitum in præsenti*, though *solvendum in futuro*; and that the rule of law could not be controlled by the intention of the parties.

Ld. Raym. 515; Carth. 511, Comb. 242; Lill. Ent. 214; Salk. 325; Holt, 309,

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pl. 12; Comyn, 67, pl. 42; Freem. 512, pl. 687, 515, pl. 691; 12 Mod. 288, Gage v. Acton.

Also, where a man entered into a bond to his intended wife, conditioned to leave her 1000*l.*, and the husband mortgaged his estate and died, not leaving personal assets to discharge the bond; it was decreed in equity, that admitting the bond void at law, yet it ought to be made good in equity, and that she ought to redeem and hold the land till she was satisfied her debt.

2 Vern. 290, 480; Peced. Chan. 237. [It is now settled that such a bond may be enforced *at law* against the heirs of the husband. *Milbourne v. Ewart*, 5 Term R. 381; and *Hayes ex dem. Foord v. Foord*, there cited.]

β If a marriage contract is executed, the wife is a purchaser for a valuable consideration, although the husband was in debt at the time.

Magniac & Co. v. Thompson, 1 Baldwin, 358; and see *Betts v. Union Bank*, 1 Har. & Gill, 175; *Buchanan v. Deshon*, 1 Har. & Gill, 280; *Newburyport Bank v. Stone*, 13 Pick. 240; and vide title "*Baron & Feme*," letter E. vol. 2, p. 30.*g*

The feme gave a bond to her intended husband, that in case of their marriage she would convey her lands to him in fee: they married, the wife died without issue, and then the husband died. It was adjudged, that the bond, though void in law, yet was good evidence of the agreement in equity; and the heir of the husband should compel a specified performance against the heir of the wife.

• *Cannel v. Buckle*, 2 P. Wms. 243.

(C) Releases of Lands and Hereditaments, how they inure: And herein,

1. *Of Releases that inure by way of Mitter le Estate.*

RELEASES, says my Lord Coke, may inure four manner of ways: 1. By way of *mitter le estate*. 2. By way of enlargement or creation of estate; upon both which a rent may be reserved. 3. By way of *mitter le droit*. 4. By way of extinguishment; upon which two last no rent can be reserved.

Co. Lit. 193 b, 273 b. || See Cru. Dig. vol. iv. p. 84, 123.||

When two or more become seised of the same estate by a joint title, as by a contract or descent as joint-tenants or coparceners, and one of them releases to the other his or her claim, right, and pretensions, such release is said to inure by way of *mitter le estate*.

Co. Lit. 273 b.

For if there be two joint-tenants, and one of them release to the other, the releasee is in by the original conveyance; and such release is no alienation, nor doth it make (a) a degree; (b) nor can this be any injury to a stranger's *præcipe*, for he may bring it against them all, and if any of them disclaim, the rest must defend for the whole, or lose their interest.

Co. Lit. 273 b. (a) But if there are three joint-tenants, and one releases to another of them, such a release makes a degree. Co. Lit. 273 b; Winch. 3.—So does the release of one coparcener to another. Co. Lit. 273. (b) Booth, 33.

And herein it is to be observed, that joint-tenants can only regularly pass their estates by release; and that by reason of the privacy which must necessarily be in releases which inure by way of *mitter le estate*, a fee-simple passes without the word *heirs*.

Vide title *Joint-tenants*, vol. 5.

But if there be two tenants in common, they cannot release to each other, but they must pass their estate by feoffment, &c., because this estate being established by different notorieties, each having passed by distinct liversies,

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they must pass to each other by a distinguishing livery, else it cannot be known in whom such parts are as formerly had passed by a distinct livery.

Vide title *Joint-tenants and Tenants in Common*, vol. 5.

β Although a tenant in common cannot release to his co-tenant, and thus enlarge his estate, an agreement for mutual releases between parties about to make partition would be enforced in equity after such partition.

Case of Coates Street, 2 Ashmead, 12; and see *Syme v. Johnson*, 3 Call. 358; *Jones's Devises v. Carter*, 4 H. & M. 184; *Lessee of White v. Sayre*, 2 Ohio R. 110; *Curtis v. Swearingen*, 1 Breese, 275; *Moore v. Eagles*, 1 Murph. 302; *Pringle v. Sturgeon*, Littel Ca. 112; *Parker v. Anderson*, 5 Munr. 450; *Overton v. Lacy*, 6 Munr. 17. But see *Woodhull v. Lonstreet*, 3 Har. 54.

A release from several coparceners to another coparcener and her husband passes nothing to the husband.

Rogers v. Turley, 4 Bibb, 355.*g*

|| A, B, and C are tenants in common in tail; B releases to A and C, and their heirs, all his undivided part, and all his estate and interest therein, *habendum* to them, their heirs and assigns, as tenants in common, and not as joint-tenants, to the use of them, their heirs and assigns; and B covenants with A and C, their heirs and assigns, that he, his heirs, &c., will warrant and for ever defend the premises to A and C, (without the word "heirs,") against all persons; and that A and C, their heirs and assigns, should quietly enjoy, &c. : Held, that the release passed the interest of B to A and C as tenants in common, and not as joint-tenants; and that the warranty annexed to the release created a discontinuance of B's estate-tail, and barred B, and those claiming under him, as against those claiming under the release, of a subsequently acquired right in fee.

Doe v. Prestwidge, 4 Maul. & S. 178.||

As to coparceners, they having in respect of the descending line distinct estates, they may pass the same by feoffment, &c., or may release to each other, and shall join in an assize, as each is seised *per my et per tout*.

Vide title *Coparceners*, vol. 2.

If there are two coparceners, and the one enters in the name of both, and the other releases to him, this countervails entry and feoffment, and is good cause of voucher; but where one enters in his own name only, and claims to him alone, and the other releases to him, this is only an extinguishment of the right, and no making of the estate.

21 E. 3, 27; Bro. *Releases*, 16; 2 Roll. Abr. 403.

β A legal entry made by one coheir or tenant in common, inures to the benefit of all.

Caruthers v. Dunning, 3 Serg. & R. 381; *Cloud v. Webb*, 3 Dever. 317; *Coleman v. Hutchinson*, 3 Bibb, 209; *Barrett v. French*, 1 Conn. 354; *Brown v. Wood*, 17 Mass. 68; *Barnard v. Pope*, 14 Mass. 434; *Shumway v. Holbrook*, 1 Pick. 114.

But if one tenant in common enters on the whole and claims it exclusively for twenty-one years, an actual ouster will be presumed.

Frederick v. Gray, 10 Serg. & R. 182; *Preston v. Nivers*, 4 Mason, 326; *Thomas v. Garvin*, 4 Dev. 223; *Baird v. Baird*, 1 Dev. & Bat. Eq. 524; *Terrell v. Murray*, 4 Yerger, 104; *Parker v. Locks and Canals*, 3 Met. 91; *Cummings v. Wyman*, 10 Mass. 464.

One tenant in common may maintain ejectment in his own possession against a mere disseisor.

Smith v. Starkweather, 5 Day, 207; *Churond v. Cunningham*, 3 Blackf. 85; *Mason*

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v. Finch, 1 Scam. 497. But see Austin v. Hall, 13 Johns. 286; White v. Sayre, 2 Ohio R. 110.*g*

If there be two parceners of a rent, and one of them marry the terretenant, and the other release to her, this shall inure by way of *mitter le estate*, and yet the rent was suspended at the time of the release: but if she had released to the husband, it would have inured by way of extinguishment.

Co. Lit. 273 b; Raym. 413, cited.

One joint-tenant of a reversion depending on a lease for life may release to the other; but if the rent be arrear, the one cannot release his interest in the arrearages to the other.

2 Roll. Abr. 403; Lev. 167.

If A feme sole and B are joint-tenants for life, and A takes C to husband, and after A and C levy a fine to B, by which they grant the land to B, *et quicquid habent*, &c., and his assigns, with warranty, and after B dies, living A, yet the lessor may enter into the whole, and there shall not be any occupant of any part, because this fine inures as a release, not by *mitter le estate*, but by way of extinguishment.

2 Roll. Abr. 409; 2 Roll. R. 398, 485, Eustace v. Scawen.

If one joint copyholder release to his companion, this is good without surrender or admittance; for the first admittance was of them and every of them, and the ability to release was from the first conveyance and admittance.

Winch, 3, Wase v. Pretty.

If land be given to two upon condition that they shall not alien, and one of them release to the other, this is no breach of their condition.

Winch, 3.

β If the lessee by stipulation in the lease be prohibited from transferring the lease to a third person, without the consent of the lessor, the executor of the lessee may transfer the lease without it, or against such consent.

Barron v. Duncan's Executors, 6 Louis. R. 103. But as to conditions not to underlease, see Jackson v. Brownell, 1 Johns. 267; Jackson v. Agan, Ibid. 273; *Ex parte Cocks*, 2 Drac. 15; Lloyd v. Powell, 8 D. & R. 35.*g*

If two joint-tenants in fee let the land for life, reserving a rent to them and their heirs, if one release to the other and his heirs, this release is good, and he only to whom it was made shall have the rent of tenant for life, and a writ of waste without attornment to such release, for the privity which was once between the tenant for life and them in the reversion.

Vaugh. 45.

A and B, joint-tenants for their lives, remainder to the first son of A in tail, and so to the second, &c., remainder to the right heirs of B. Before any issue had, A releases to B, and his heirs, and after hath issue a son; and the question was, If by this release before the birth of a son the contingent remainders was destroyed? And though it was urged that this uniting of the estate for life with the remainder in fee, being by conveyance and act subsequent to the limitation of the contingent remainders, and before they came in being, had destroyed them; yet it was adjudged by three judges against Dolben, that these contingent remainders were not destroyed, for that to some purposes the whole fee was executed in B immediately upon the first conveyance, and this release of

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A gave him no greater estate nor in any other degree than he had before, for after such release he is in of the whole estate by the lessor, as he was before, and as he would have been had it come to him by survivorship.

2 Jon. 136 ; Raym. 413, *Harrison v. Belsey* ; Vent. 345, S. C., but says it was adjudged that the contingent remainders were destroyed. * * See *Fearne on Contingent Remainders*, (3d edit.) 259, &c. * * *

2. Releases by way of *Mitter le Droit* how they inure.

Releases are said to inure by way of *mitter le droit* where a person is disseised, and he releases to the disseisor, his heir or feoffee, who being in possession are therefore capable of taking a release of the right.

Co. Lit. 274, 276. ¶ Words of inheritance are not necessary in releases by way of *mitter le droit*, as the disseisor to whom, or to whose feoffee or heir the release is made, acquires the fee by the disseisin, and cannot take it under the release. Co. Lit. 274 b, n. (1).¶

If there be two disseisors and the disseisee release to one of them, he shall hold out his companion ; because the disseisor comes in by no lawful or established act of notoriety, which ought to be defeated before the manner of possessing can be altered ; and therefore though he possessed as a joint-tenant before the release, yet, after the release, he shall oust his companion, because he was possessed of the whole before by wrong, and now being possessed by right, it follows that the possession of the other wrong-doer is no possession at all.

Lit. sect. 472.

But if a disseisor had enfeoffed two, the release of the disseisee to one should inure to both, (a) because coming in by the legal notoriety of a feoffment, that must be defeated by an act of equal notoriety before the title can be altered, because the feoffment must stand good as an act that gives warning to all persons in whom the freehold subsists, till by some act of equal solemnity it appears that the freehold is in another.

Co. Lit. 276 a. (a) That the feoffees are in by title, and are presumed to have a warranty, which is much favoured in law. Co. Lit. 276.

β Where two persons are in possession of land by an imperfect or a tortious title (as by disseisin) a release to one of them will inure to the benefit of both.

Flagg v. Mann, 2 Sumn. C. C. R. 487.g

So, where a disseisor makes a lease for life, the remainder in fee, and the disseisee releases to the tenant for life, or to the remainder-man, this inures to them both ; because coming in by a known conveyance, it cannot be altered unless it were defeated by an act of equal notoriety.

Co. Lit. 274, 275.

If a disseisor makes a lease for life, and the disseisee releases to tenant for life, this shall not inure to him in reversion, because the release cannot alter the estate that passed by the feoffment without some act that destroys the feoffment.

Co. Lit. 276.

So, if there be two disseisors, and they make a lease for life, and the disseisee release to tenant for life, this shall inure to them all.

Co. Lit. 276.

If there be tenant for life, the remainder in fee, and tenant for life be disseised by two, and he release to one of them, he shall not hold out his

(C) Releases of Lands and Hereditaments, &c.

companion. So, if the remainder-man had released to one of the disseisors, he should not hold out his companion.

Co. Lit. 276.

But if tenant for life and he in remainder join in a release to one disseisor, he shall hold out his companion; because when the possession is notoriously in them both, each of them are capable of a release, and when one has obtained a release, it makes his possession rightful, and his holding out his companion makes it immediately notorious that the estate is in him alone.

Co. Lit. 276.

So also, if the disseisors make a lease for years, and the disseisee releases to one of them, this shall inure to them both; because he cannot make it notorious that the estate is in him alone, because he cannot hold out his companion during the continuance of the lease for years.

Co. Lit. 276.

So, if two joint-tenants are disseised by two, and one releases to one of them, he shall not hold out his companion; because he cannot hold him out of the whole, because he has not the whole right, and so there can be no act of notoriety whereby the estate may appear to be in one disseisor.

Co. Lit. 276.

If the king's tenant for life be disseised by two, and he release to one of them, this inures to both; because he can only be disseised of an estate for life, since the reversion in the king cannot be divested. (a)

Co. Lit. 277. (a) There is not any such position in fo. 277, either a or b.—In 276 a., it is said, if the king's tenant for life be disseised by two, and he release to one of them, he shall hold out his companion, for the disseisor gained but the estate for life.

If there be tenant for life, remainder in fee, and they be disseised, tenant for life cannot release to him in remainder, because the naked right cannot be transferred.

Co. Lit. 276.

β A disseisor in possession has a lawful estate which he may alien, and his alienee will have a good title as against all persons not having a paramount title.

Flegg v. Mann, 2 Sumner, 487.

But the right is limited by the actual occupation of the disseisor.

Watrous v. Southworth, 5 Con. 305; Brimmer v. Long Wharf, 5 Pick. 131; Kennebeck purchase v. Springer, 4 Mass. 416.

A release to one in possession of lands, whether by right or wrong, will operate to pass such right if made by one having it.

Poor v. Robinson, 10 Mass. 131; Everenden v. Beaumont, 7 Mass. 76.g

If the heir of the disseisor be disseised, and the disseisee release to such disseisor, and after the heir recover against such disseisor, the right of property goes along with it; because when the heir recovers he defeats the possession of the disseisor as if it had never been, so that the disseisor can never recover in any action; for in the writ of right he must lay the possession in himself or some of his ancestors: and this he cannot do in this case, for here there never was any possession in him but what was totally defeated and destroyed; and he cannot recover by the old possession of the disseisee, for that was turned into a naked right, which could not be transferred but to a true and real possession; and

(C) Releases of Lands and Hereditaments, &c.

here being no possession but such as stands defeated, it is the conveyance of a naked right, which the law will not allow.

Co. Lit. 276; 8 Co. 152.

If the heir of the disseisor be disseised, and the disseisee release to the disseisor upon condition, and the condition be broken, this revests the naked right in the disseisee; because when the condition is broken the release is as if it had never been, and therefore the disseisee may recover by virtue of his ancient seisin.

Co. Lit. 277.

If two men gain an advowson by usurpation, and the right patron releases to one of them, he shall not hold out his companion, but it shall inure to them; for their clerk came in by admission and institution, which are judicial and notorious acts.

Co. Lit. 276.

3. Releases that inure by way of Extinguishment.

In some cases where the releasee cannot have the thing released by way of *mitter le droit*, &c., yet the release shall inure by way of extinguishment against all manner of persons: as, when the lord releases his seignory to his tenant of the land, or when the grantee of a rent-charge or common releases to the tenant. And such releases absolutely extinguish the rent, &c., although the releasee be only tenant for life.

Co. Lit. 279 b, 280. ||Vide tit. *Extinguishment*, vol. 4. p. 143.||

If a lease be made to one for life, reserving rent to the lessor and his heirs, if the lessee be disseised, and after the lessor release to the lessee and his heirs all his right in the land, and after the lessee enter; in this case the rent is extinct, but the right of the reversion doth not pass.

Lit. sect. 456.

If there be lord and tenant, and the tenant be disseised, and the lord release to the disseisee all the right which he has to the seignory or in the land, this release is good, and the seignory extinct.

Lit. sect. 454.

But yet, if the tenant, notwithstanding he is disseised, puts his beasts on the land, and the lord takes them for rent arrear, the disseisee shall compel (a) him to avow on him; and if the lord avows upon the disseisor as his tenant, and the disseisee reply and show the special matter how he was tenant and was disseised, this shall abate the lord's avowry. (b)

Co. Lit. 268; Lit. sect. 454. (a) See the stat. 21 H. 8, c. 19, and Co. Lit. 268 b. (b) For the disseisee is tenant to him in right and in law.

But if the tenant be disseised, and the lord accept rent from the disseisor, and then the lord distrain his beasts for rent in arrear, he may compel the lord to avow on him; and the lord cannot traverse the disseisor's title, having once admitted it by acceptance of the rent from him.

Co. Lit. 268.

And, according to my Lord Coke, if after such acceptance the disseisee should put in his beasts, and the lord should distrain them, the disseisee cannot compel the lord to avow on him, because it was his own laches to let the disseisor continue till rent was due and accepted.

Co. Lit. 268 b. [But 48 E. 3, 9, seems to the contrary, because when the tenant pleads disseisin to compel the lord to avow upon him, it is strange that the lord, by his own act of acceptance, should maintain his avowry, and destroy the feudal contract. Gilb. Ten. 64, 65.]

(C) Releases of Lands and Hereditaments; &c.

So, if the disseisor dies seised, the heir of the disseisor comes in by title, and then the disseisee cannot compel him to avow upon him, for he has lost the right of possession; and the disseisee cannot put his beasts on the ground, and therefore cannot compel the lord to avow on him, and therefore the lord must take the heir who has such right of possession to be his rightful tenant; but because the disseisee may enter and occupy the land before the descent cast, therefore the lord may release to him and discharge the contract, which is to his benefit, and is still so far subsisting that he may take advantage of it.

Co. Lit. 268.

So, where donee in tail releases to the disseisor all his right, yet if he in the reversion releases to him afterwards, it shall extinguish the rent.

Co. Lit. 280.

There is a diversity between a seignory and a bare right to land; for a release of a bare right to land to one who has but a bare right is void, but a release of a seignory to him who has but a right is good to extinguish the seignory.

Co. Lit. 268.

But if there be lord and tenant, and the tenant make a feoffment in fee, and afterwards the lord release to the feoffor, this extinguishes nothing; for by the feoffment the relationship between the lord and tenant is destroyed, and the feoffor only of necessity becomes tenant in the avowry till the lord procures his arrears.

Co. Lit. 269; Lit. sect. 457.

If a feme mesne marries her tenant, and the lord releases to the feme the seignory is extinct; but if he releases to the husband, both the seignory and mesnalty are extinct.

Co. Lit. 280.

If the tenancy be given to the lord and a stranger, and the heirs of the stranger, and the lord release all his right to his companion; this not only passes his estate in the tenancy, but also extinguishes his right in the seignory.

Co. Lit. 280.

If lessee for years be ousted, and he in the reversion disseised, and the lessee release to the disseisor, the disseisee may enter, for the term for years is extinct and determined. But were it in the case of a lessee for life it would be otherwise, because the disseisor has a freehold whereupon the release of tenant for life may inure.

Co. Lit. 275.

Lessee for years devised the term to his wife for life, the remainder of the years to J S, who by deed released all his right, interest, term for years, possession, and demand in the said land to him who had the reversion in fee; and by this it was held, that the possession was extinguished in the reversion, and that the reversioner may after the death of the wife well enter.

Jon. 389, *Johnson v. Trumper*.

If the lord releases his right in one acre, this extinguishes the whole seignory.

Moore, 56, pl. 161, *per cur. Dals.* 60; and vide *And.* 235.

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So, if a man has a rent-charge out of twenty acres, and he releases all his right in one acre, this extinguishes all the rent.

Bro. *Releases*, pl. 18.

But it hath been held, that if the grantee of a rent-charge releases part of his rent, such release does not extinguish the whole rent.

Co. Lit. 148; and vide Cro. Eliz. 742.

A release of part of land out of which a ground-rent issues, does not extinguish the whole rent, but leaves the remainder subject to its proportional part.

Ingersoll v. Sergeant, 1 Whart. 337.

So, if a portion of the lot be taken for public use, and the damages or a portion thereof be paid to the owner of the rent-charge.

Cuthbert v. Kuhn, 3 Whart. 357. As to a release by a mortgagee of a portion of the mortgaged premises, see *Patty v. Pease*, 8 Paige, 277; *Parkman v. Welsh*, 19 Pick. 231; *Hicks v. Bingham*, 11 Mass. 300.*g*

If the lord releases to his tenant all his right to the land and seignory, *salvo sibi dominio suo*, this does not extinguish the tenure, but only the annual services.

Dyer, 157 b, pl. 29.

4. *Releases that inure by way of Enlargement: And therein, of the modern Manner of Conveyancing by Lease and Release.*

Releases inure by way of enlargement when the possession and inheritance are separated for a particular time, and he who hath the reversion or inheritance releaseth to the tenant in possession all his right or interest in the land. Such release is said to enlarge his estate, and to be equal to an entry and feoffment, and to amount to a grant and attornment. And herein the law requires privity of estate, that the releasor have a right, and the releasee such a possession (*a*) as will make him capable of taking an estate.

Co. Lit. 273; Finch, 44; 5 Co. 124; Dyer, 302. (*a*) Possession countervails, and is equal to livery. Dyer, 269, pl. 20, margin.

A release of land to one out of possession is inoperative.

Bennett v. Irwin, 3 Johns. 363; *Porter v. Perkins*, 5 Mass. 233; *Hamblett v. Francis*, 4 Mass. 75; *Warren v. Childs*, 11 Mass. 222; *Mayo v. Libby*, 12 Mass. 339.

But if made for a valuable consideration, it will be construed to be any lawful conveyance by which the estate might pass.

Pray v. Pierce, 7 Mass. 381; *Russell v. Coffin*, 8 Pick. 143.*g*

And therefore if there be lessee for life or years in possession, the lessor may enlarge their estates by release. So, if they assign or grant over, the estate or interest of grantee or assignee may be enlarged by the release of him in reversion.

Co. Lit. 273; 2 Roll. Abr. 401.

So, if there be a lessee for life, remainder in tail, the remainder in fee, he in remainder in fee may enlarge the estate of the lessee by release, notwithstanding the mesne remainder.

44 Ass. 35; but vide Brownl. 207.

But if A makes a lease for life, and lessee for life makes a lease for years, and A releases to the lessee for years and his heirs, this is void; because there is not the consent of the tenant for life, who is immediate tenant to the reversioner, and ought to attorn to his grants.

Co. Lit. 272.

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So, if a man leases for twenty years, and the lessee assigns for ten years, a release by the reversioner to the assignee is void for want of privity. But a release to the lessee is good, for he hath the possession notwithstanding the assignment; the possession of the lessee being always considered the possession of the lessor, and that he holds as his bailiff.

Co. Lit. 270; Dyer, 4, pl. 2; Carter, 62.

If a man makes a lease for years, the remainder for life, and afterwards releases to the tenant for years, this is good; because the tenant for years holds of the reversioner, and pays him the services, and ought to attorn to his grants, and not he in the remainder for life; and therefore where tenant for years accepts a release of the reversion, it must in consequence be good. And in this case a release to him in the remainder for life would be good likewise, because the lessee in the original creation took the estate for years subject to such remainder for life, and therefore there needs no consent from the lessee for years to enlarge the estate.

Co. Lit. 273.

If tenant by the curtesy grants over his estate, he is not afterwards capable of taking a release; for his estate is created merely by law, and he remains tenant to the heir, and subject to waste, and is compellable to attorn to the grants of the reversioner; yet he is not capable of a release, because he has no notorious possession *in pais*, which may be enlarged into a fee.

Co. Lit. 273 a.

But the grantee of tenant in dower, or by the curtesy, is capable of taking a release, because of the privity and notoriety of possession.

2 Roll. Abr. 400, 401.

If a feme covert be tenant for life, a release to the husband and his heirs is good, for there is both privity and an estate in the husband, whereupon the release may sufficiently inure by way of enlargement; for by the inter-marriage he gains a freehold in right of his wife.

Co. Lit. 273 b; Keilw. 129, pl. 97.

If an infant makes a lease for life, and the lessee assigns it over to another with warranty, the infant at full age brings a *dum fuit infra aetatem* against the assignee, and he vouches the assignor, who enters into the warranty, the demandant cannot release in fee so as to enlarge the estate, because the vouchee has no possession.

Co. Lit. 273 a, b.

But he who aliens pending the writ may, as long as that writ is pending, accept a release from the demandant. So may a vouchee after he hath entered into the warranty, for though they be not tenants, yet the law and the parties have allowed them as tenants *inter se* for that suit.

Lit. sect. 490; Co. Lit. 266, 284 b; Hob. 338.

If a man makes a lease for life, the remainder for life, and the first lessee dies, a release to him in the remainder, and to his heirs, is good before he enters to enlarge his estate; because he hath an estate of freehold in law in him, which may be enlarged by release before entry.

Co. Lit. 270 b.

But at common law a release to a lessee for years before entry is void; yet it is said by my Lord Coke, that if a man makes a lease for years,

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the remainder for years, the first lessee enters, a release to him in the remainder for years is good to enlarge his estate.

Co. Lit. 270.

And if a lease for years be made to two, albeit the lessor before they enter cannot release to them to enlarge their estate, yet one of them may before entry release to the other.

Co. Lit. 270 b.

β Where a grantee of land in a deed with warranty from a person having no title, enters upon the land, and afterwards the grantor takes a release from the owner, this will operate as a confirmation of the first grantee's title, though neither the releasor or releasee was in possession at the time of the release.

Oakes v. Marcy, 10 Pick. 195.

The general rule of the common law is, that no right passes by a release but what the releasor had at the time it was made.

Quarles v. Quarles, 4 Mass. 680.*g*

If an advowson (*a*) be granted for years, the patronage for years is in the grantee, and he may accept a release in fee of the patron. But if one, two, or three avoidances are granted, the patronage is not separated, nor can such grantee accept of a release in fee of the patron in fee who hath the inheritance.

Jon. 19. (*a*) If a man seised of a rent in fee grants it for life, he may enlarge it by release. 43 Ass. 8; 2 Roll. Abr. 400.

If A, a member of a corporation, disseise B to his own use, or if a mayor and commonalty disseise B, and B in the first case release to the mayor and commonalty, or, in the second, to a particular member of the corporation; nothing passes by these releases, for they are distinct persons, and claim in different rights, consequently there is no privity.

8 H. 6, 1; Bro. Releases, pl. 62; 2 Roll. Abr. 403.

If a man sues execution upon an *elegit* (*b*) of the lands of his debtor, and the debtor who hath the inheritance confirms his estate, he may afterwards enlarge it by a release, for the confirmation hath created a privity between them.

31 Ass. 13; 2 Roll. Abr. 401. (*b*) So, of a tenant by statute merchant or staple. Co. Lit. 270 b.

A release by a lessor to his lessee at will, having entered by force of such lease, is good in respect of the privity between them, and as it would be a vain thing for the lessor to make livery and seisin to one already in possession of the land by his own agreement.

Co. Lit. 270; Lit. sect. 460; Dyer, 269 b, pl. 20; Owen, 28, 29, S. P.; and that such lessee shall have aid. β Where one to whom a parcel of marsh was let, mowed it, and removed the hay, exercising no other act of possession, and soon afterwards took a deed of release; held, that he had a possession sufficient to render the release operative. Thatcher v. Cobb, 5 Pick. 423.*g*

But if tenant at will makes a lease for years, and the lessee enters, he only is the disseisor, and a release or confirmation to the tenant at will afterwards is void, because the privity is determined.

Cro. Eliz. 830, Shaw v. Barber.

A release to a tenant at sufferance, as where lessee for years holds over, is void; for though there be a possession yet there is no privity, which is equally requisite.

Co. Lit. 270 b; Dyer, 28, pl. 19; Cro. Eliz. 268; 3 Leon. 152; Brownl. 207; Cro. Ja. 179.

If one enter of his own wrong, and takes the profits, his words, "to

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hold it at the owner's will," cannot qualify the wrong, for he is a disseisor, and in such case the owner's release to him is good: or, if the owner consented, he is tenant at will, and in such a case the release is likewise good.

Co. Lit. 271 a.

The ancient manner of conveyancing was by feoffment, but the manner of making livery and seisin begetting many nice questions, grew troublesome, which put lawyers upon new devices, and introduced the modern manner of conveyancing by lease and release. This method is said to have been first (a) invented in King Charles the First's reign, and has its validity from the reasons drawn from the statute of uses; for, by the bargain and sale for a year, the bargainee by force of the statute is in possession without entry, and when the bargainor releases to him in possession, the lease is merged, and the bargainee hath the inheritance. For, as at common law, if a man granted a lease, and the lessee entered, this divided the estate, and left a reversion in him, and the possession in the lessee; but still, by the common law, the lessee (b) before entry could not accept of a release, having only an *interesse termini*; and now though the lessee does not enter, yet the statute vesting the estate or use in him for a year he is deemed to be in the actual possession, and so capable of a release as much as a lessee in possession was at common law. But yet this lessee cannot have trespass till an actual entry.

(a) By Sir Francis Moor, 2 Mod. 252; 2 Salk. 678, pl. 5; 2 Ld. Raym. 798, and vide 7 Mod. 74. || See Preston on Convey. vol. ii. p. 207. || (b) Lit. sect. 459; 5 Co. 124; Plow. 423. || Vide Co. Lit. 271 b, note (1). ||

Lessee for years cannot make a lease for years within the statute of uses, so as by this means to give the possession, and make his lessee capable of a release of the reversion.

Lutw. 570; 7 Mod. 73.

In ejectment upon a special verdict the only question was, whether a lease for a year upon no other consideration than reserving a pepper-corn, if it be demanded, could operate as a bargain and sale, and so make the lessee capable of a release? And resolved that it should, the reservation making a sufficient consideration to raise an use in the same manner as a bargain and sale does.

Mod. 262; 2 Mod. 249; 2 Vent. 35, Barker v. Keate.

A release to *cestui que use* is good: so to a *cestui que trust*, who being in possession may at least be considered as tenant at will.

Godb. 299; Hard. 491; Carter, 162.

5. *What Estate or Interest passes by the Release: And therein of the Words requisite to an Enlargement.*

Releases, like other conveyances, regularly require words of inheritance; so that if the lessor release to his lessee for years, without saying to him and his heirs, such lessee hath only an estate for his life.

Lit. sect. 465; Co. Lit. 273 b; Jenk. 200; Jon. 328; Cro. Car. 335.

So, if a release be made to tenant by statute staple or merchant, or *elegit*, by him in the reversion of all his right in the land, by this a freehold passes for the life of the release; it being the greatest estate that can pass without apt words of inheritance.

Co. Lit. 273 b; 2 Vent. 328.

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If a lessor release to his lessee *per auter vie*, he gives him an estate for his own life.

Co. Lit. 275 b.

A chantry priest incorporate took a lease to him and his successors for 100 years, and afterwards took a release from the lessor to him and his successors; and it was adjudged, that by the release he had but an estate for life, for he had the lease at first in his natural capacity, for that it could not go in succession; and the words *his successors* could not give him an estate of inheritance in the same capacity he had the lease, for want of the words *his heirs*.

Comp. Incumb. 373.

But if the lord releases all his right to the tenant, the seignory is extinct without the word *heirs*; for this instrument is to discharge the estate of the tenant, and therefore has a necessary relation to the estate which the lord at first created, and consequently it refers to those words that in the original of the estate gave him a fee-simple.

Co. Lit. 9; Coke, R. on Fines, 7.

So, in releases that inure by way of *mitter le estate*, the word *heirs* is not requisite; as, where there are two coparceners, and one of them releases to the other, this gives a fee without the word *heirs*, because it hath a necessary relation to the estate whereof the other was seised.

Co. Lit. 9, 292.

So, if there be two joint-tenants, and one release to the other, this passeth a fee without the word *heirs*, because it refers to the whole fee, which they jointly took and are possessed of by force of the first conveyance. But tenants in common have distinct estates, and cannot enlarge the estates of each other without proper words of inheritance. (a)

Co. Lit. 9, 200. [(a) But tenants in common cannot release to each other, the freehold being several.]

β But although a tenant in common cannot release to his co-tenant and thus enlarge his estate, an agreement for mutual releases between tenants about to make partition will be enforced in equity after such partition.

Case of Coates Street, 2 Ashmead, 12; see also *Syme v. Johnson*, 3 Call. 358, *Jones v. Carter*, 4 H. & M. 184; *Lessee of White v. Sayre*, 2 Ohio R. 110; *Curtis v. Swearingen*, 1 Breese, 275; *Moore v. Eagles*, 1 Murph. 302; *Pringle v. Sturgeon*, Littel Ca. 112; *Parker v. Anderson*, 5 Monr. 450; *Overton v. Lacey*, 6 Monr. 17. But see *Woodhull v. Longstreet*, 3 Har. 54.g

If lands be given to baron and feme, and the stranger in fee, and the stranger release to the baron; (b) this gives him the fee without other words of inheritance.

And. 45. (b) *Secus*, had the release been made to the wife. *Dyer*, 265 a, pl. 34.

β A release from several coparceners to another coparcener and her husband passes nothing to the husband.

Rogers v. Turley, 4 Bibb, 355.g

A release by one of a bare right for a day or an hour is as good as if it was made to the other and his heirs; for the disseisee cannot release part of his estate in the right, because he has no right to any estate but that whereof he was seised, therefore he must release his right to that or none at all.

Co. Lit. 274.

(D) Who are capable of releasing.

β A mere naked possibility of interest in premises is not the subject of release.

Pelitrean v. Jackson, 11 Wend. 110.

A release by an heir apparent of his estate in expectancy, with a covenant, against himself and all claiming under him, is, if made fairly, and with the consent of the ancestor, a bar to the releasor's claim thereto, by descent or devise, after the death of his ancestor, and such a covenant runs with the land.

Trull v. Eastman, 3 Met. 121.*g*

(D) Who in respect of their Right or Interest are capable of releasing.

A BARE authority cannot be released; as, where a man by will directs that his executors shall sell his lands, this being a power only, and no matter of interest in the executor, he cannot release (a) it to the heir.

Co. Lit. 265 b; Roll. R. 197; 3 Bulst. 31. (a) So, if *cestui que use* had devised that his feoffees should sell the land, and they had made a feoffment over, yet might they have sold the use. Co. Lit. 265 b.

But though these powers in strangers cannot be released, yet a power of revocation in the feoffor or party from whom the estate moved may be released by deed, or by levying a fine, which is a release in law; for it is in nature of a condition, whereby he may restore himself to his former estate whenever he pleases, and consequently such power, like other reservations, may be released.

Co. Lit. 237, 265; Co. 110; 4 Leon. 133.

After one has found surety of the peace all the king's subjects have an interest in it, and neither the king nor party against whom it is found can release it.

21 E. 4, 40; 2 Roll. Abr. 401.

In trespass or *detinue* by the villein the release of the lord is a good bar.

18 H. 6, 23; 2 Roll. Abr. 402.

If a commonalty be disseised, and after every one release for himself it is not good, because it ought to be by their common seal.

19 H. 6, 64; 2 Roll. Abr. 402.

β When the inhabitants of a place claim a right of fishery as annexed to their inhabitancy, a release by one of them is inoperative even as against himself.

Jacobson v. Fountain, 2 Johns. 170.

A right of private way may be extinguished by a release of all the parties interested in it.

Wright v. Freeman, 5 Har. & Johns. 467.*g*

A person who procures an outlawry in debt may release the party, for the release is a satisfaction to him; and the outlawry in this case being pardoned by act of parliament, the party is absolutely discharged.

Noy, 5, *Albany v. Manny*.

If A covenants with B that C shall pay to D 8*l.* yearly, and D takes J S to husband, who releases the payment to A, this release does not discharge him; for J S is a stranger to the covenant, and hath no right in him.

3 Bulst. 29; Roll. R. 196; 2 Roll. Abr. 402, *Quick v. Ludburrow*.

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If A has judgment against B for debt or damages, and after extends the land of B for this debt, and then assigns over the land extended to C for all his estate therein, and after A releases to B the judgment; this shall avoid the extent, so that B may have an *audita querela* against C the assignee, and therein shall avoid the extent, (a) because A, notwithstanding the assignment, continues privy to the judgment, and might after the assignment have acknowledged satisfaction of the judgment, and so defeat the estate of the assignee. And this release is all one as if he had acknowledged satisfaction of the judgment.

2 Roll. Abr. 402; Jon. 238; Cro. Car. 214, *Flower v. Elgar*. (a) *Qu.* If there may not be relief in equity? Vide Vern. 50.

If one joint-tenant of a rent in fee releases all his right, yet this does not pass the moiety of his companion; (b) but in personal actions one joint-tenant may release the whole; but if the personalty be mixed with the realty, it is otherwise.

21 E. 3, 58; 2 Roll. Abr. 411. (b) 2 Co. 68.

§ A release by two of three lessees will not bar an action against the landlord by the third unless the covenant is joint.

Eisenhart v. Slaymaker, 14 Serg. & R. 153; *Jackson ex dem. Hallenbake v. McClaskey*, 2 Wend. 541.

But a release of a partnership debt by one of two partners will bar an action against the debtor, although the releasor had no authority to discharge more than his moiety.

Salmon v. Davis, 4 Binn. 375; *Scott v. Trents*, 1 Wash. 77; *Bulkley v. Dayton*, 14 Johns. 387; *Pearson v. Hooker*, 3 Johns. 68; *Southard et al. v. State*, 3 Monr. 437; *Yandes v. Lefevre*, 2 Blackf. 371; *Arnol v. Bureau*, 11 Martin, 213; *Herman v. Lou. Ins. Co.*, 8 Louis. 289; *Emerson v. Knower*, 8 Pick. 63. But see *Emerson v. Baylis*, 19 Pick. 55.

In debt for rent by tenants in common, a release by one is a bar to the action, but in a distress and avowry for rent a release by one is not a discharge as to the other.

Decker v. Livingston, 15 Johns. 479.

Where several plaintiffs must join in bringing a *personal* action, a release by one joint plaintiff is a bar to the action.

Austen v. Hall, 13 Johns. 286; *Eastman v. Wright*, 6 Pick. 316.

A release of lands by one of two trustees, from the operation of a mortgage, is not in itself sufficient to discharge the lands; it must be executed by both trustees to render it available.

Van Rensselaer v. Aken, 22 Wend. 549. It may however be rendered available by the acts of an assignee of the trustees. *Ibid.*

A release by the common vouchee is no bar, for he renders nothing, and can be at no loss.

Cro. Eliz. 2, 3.

So, if the plaintiff in ejectment, who is a mere nominal person and trustee for the lessor, release the action; or if an action be brought in his name for the mesne profits, and he release it, this in either case is no bar; but from the power the courts now exercise of regulating all proceedings in these actions, is such a contempt for which the party may be committed.

Raym. 93; *Skin*. 247, pl. 1; *Comb.* 8; *Salk.* 260, pl. 15. ||But now it is held, that John Doe is the real plaintiff for the purpose of releasing the action. 4 Maule & S.

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300; 2 Chitt. R. 323. And that the lessor of the plaintiff, having parted with his interest, cannot release the action.||

If a lessor after assignment of the reversion release to the lessee all covenants and demands, yet the assignee may have an action of covenant for rent due after the assignment, for it runs with the reversion at common law, before the stat. 32 H. 8, (cap. 34,) and passes by the grant of the reversion, and therefore the lessor could not release it after the assignment.

2 Jon. 102; 2 Lev. 206, *Harper v. Bird*; Cro. Car. 503, L. P.—that a creditor, after an assignment of his debt, cannot release the debtor. 2 Chan. Ca. 169. ||Vide 1 Bos. & P. 447.|| β *Kane v. Sangor*, 14 Johns. 89; *Sumner v. Stewart*, 2 N. Hamp. R. 39; *Sloan v. Somers*, 2 Green, 102. See *Coleman v. Walcott*, 4 Day, 6. A release cannot operate to extinguish or defeat future rights or claims. *Francis v. Boston and Rox. Mill Corporation*, 4 Pick. 365; *Hastings v. Dickenson*, 7 Mass. 135; *Gibson v. Gibson*, 15 Mass. 106.*g*

If by prescription the inhabitants of ancient messuages in a certain vill are entitled to have common within the vill by reason of their comorancy, such common cannot be released, for though one inhabitant should release it, a succeeding one might claim it.(a)

Cro. Ja. 152, *Smith v. Gatewood*. (a) Vide *Gateward's case*, 6 Co. 60, where such a claim is pleaded as a custom, and adjudged bad in law, for the reason in the text, among other reasons. β *Jacobson v. Fountain*, 2 Johns. 170. But see *Wright v. Freeman*, 5 Har. & J. 467.*g*

If by the custom of a manor the tenants thereof are to choose among themselves one to collect the lord's rents for a year, and so on annually; the lord may discharge or release a tenant of this burden, but then the others shall not be further charged than before, for when it comes to his course who is discharged the lord himself must collect it.

21 E. 4, 45, 47; 2 Roll. Abr. 401, 402.

If two churchwardens sue in the spiritual court for a levy towards the reparation of their church, and have sentence to recover, and costs assessed, and after one of them releases, yet the other may proceed for the costs, &c.; for churchwardens have nothing but to the use of the parish, and the corporation consists of both, and one only cannot release or give away the goods of the church.

March, 73; Jenk. 305; Cro. Ja. 235; Yelv. 173; 2 Brownl. 215.

A servant who distrains (b) in right of his master, or one who is robbed (c) of his master's money, cannot, on an action brought by him on the statute of *hue and cry*, release to the prejudice of his master; nor can the ordinary (d) release an administration bond.

(b) 3 Bulst. 110; Roll. R. 246. (c) 4 Mod. 305; Comb. 263. (d) Holt's R. 660.

|| Where a lessor whose bailiff had made a distress for rent commenced an action in the bailiff's name, and *with his consent*, against the sheriff, for taking insufficient pledges in replevin, and the bailiff, without the lessor's privity, released to the sheriff, and the release was pleaded *puis darrein continuance*, the Court of Common Pleas set aside the plea.

Hickey v. Burt, 7 Taunt. 48.

So, where the obligor of a bond, after notice of its being assigned, took a release from the obligee, and pleaded it to an action brought by the assignee in the name of the obligee, the Court of Common Pleas set aside

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the plea, nor would they under those circumstances suffer the obligor to plead payment to the obligee.

Legh v. Legh, 1 Bos. & P. 447; and see Mountstephen v. Brooke, 1 Chitt. R. 390, and tit. *Obligation*, vol. ii.; and 4 Barn. & A. 419.

β The assignee of a bond stands in the place of the obligee so as to let in all matters of defence which the obligor had at the time and notice of the assignment.

Wheeler v. Hughes, 1 Dall. 23; Ingles v. Ingles, 2 Dall. 49; Rundle v. Ettwein, 2 Yeates, 23; Solomon v. Kimmell, 5 Binn. 232; Burry v. Hartman, 4 Serg. & R. 177; Chamberlain v. Day, 3 Con. 353; Chamberlain v. Gorham, 20 Johns. 144; Bank of Niagara v. McCracken, 18 Johns. 493; Trueman v. Haskin, 2 Cain. R. 369; Bacon v. Warner, 1 Root, 349; Mehaffy v. Share, 2 Penn. 361; Willis v. Twambley, 13 Mass. 206; Webster v. Wise, 1 Paige, 319; Greene v. Darling, 5 Mason, 215; White v. Prentiss, 3 Monr. 510; Murray v. Lyons, 2 Johns. Ch. 441; Livingston v. Dean, Ibid. 479; Winchester v. Hackley, 2 Cranch, 342; United States v. Sturgis, 1 Paine, 525; Sharpe v. Eccles, 5 Monr. 72; Harrison v. Burgess, Ibid. 420; Kenneday v. Woolfolk, 3 Hayw. 199; Hawley v. Cramer, 4 Cowen, 717; Brashear v. West, 7 Peters, 608; Porter v. Brackenridge, Harden, 21; McGee v. Lynch, 3 Hayw. 105; Dunn v. Snell, 15 Mass. 481; Jones v. Witter, 13 Mass. 304; Parker v. Grout, 11 Mass. 157, (note); Baylston v. Green, 8 Mass. 465; Green v. Hatch, 12 Mass. 281; Cleveland v. Clap, 5 Mass. 201.

But if the obligor acknowledges his liability, or by his promises induces the assignee to purchase the bond, he will not be allowed to set up any defence he might have had against the obligee.

Ludwick v. Croll, 2 Yeates, 464; Carnes v. Field, Ibid. 541; Weaver v. McCorkle, 14 Serg. & R. 304; Smedes v. Hoochtating, 3 Cain. 48; Henry v. Browne, 19 Johns. 49; Holbrook v. Burt, 22 Pick. 546; Mowry v. Todd, 12 Mass. 281; King v. Fowler, 16 Mass. 397.

A payment made by the obligor to the obligee before notice of the assignment is good.

Barry v. Hartman, 4 Serg. & R. 175; Brindle v. McIlvaine, 9 Serg. & R. 74; Clark v. Boyd, 6 Monr. 94; Comstock v. Farnum, 2 Mass. 96. See Black v. Bird, 1 Hayw. 273; Martin v. Fox, 4 Bibb, 392.*g*

If one of several plaintiffs *fraudulently* release the action, the court will set aside a plea of release; but the fraud must be clearly made out by the affidavits of the party seeking to set aside the release.

Barker v. Richardson, 1 Young & J. 362; and see 4 Moo. 192; 7 Moo. 356; || βJohnson v. Holdsworth, 4 Dowl. P. C. 63. But see Eastman v. Wright, 6 Pick. 316; Loring v. Brackett, 3 Pick. 403. A release obtained by a debtor in consequence of his fraudulent misrepresentation and other artifices, will be set aside by a court of equity; but the mere fact of a previous assignment of his property, if not intended to mislead the creditor, is not such a fraud. Phettyplace v. Sales, 4 Mason, 312. But see Carter v. Connell, 1 Whart. 392.*g*

But a sheriff may release an obligation taken by him for the appearance of a person whom he arrests.

Cro. Eliz. 808.

In debt on a single bill made to A to the use of him and B, the defendant pleads a release made to him by B, on which the plaintiff demurs, and without difficulty it was adjudged for the plaintiff; for B is no party to the deed, and therefore can neither sue nor release it; but it is an equitable trust for him, and suable in Chancery if A will not let him have part of the money; and the book of Edward the Fourth, cited to prove that he might release in such a case, was denied to be law.

Lev. 235, Offley v. Ward; Lit. R. 149, L. P.

3 A release executed by one of the parties to a suit in a Court of Chan-

(E) Of Releases by Executors and Administrators.

cery, where the accounts are impeached, will not prevent the court from looking into the settlement.

Kelsey v. Hobby, 16 Peters, 276.*g*

(E) Of Releases by Executors and Administrators.

AN executor may, before probate of the will, release a debt due to the testator, for he derives his authority from the testator, and not from the act of the ordinary; in like manner may he pay debts, and take releases, &c.

5 Co. 28; Off. Exec. 33; Plow. 281.

And it hath been held, that if an executor releases all actions, this will extend as well to actions which he hath in his own right, as to those which he hath as executor; (a) but yet in some cases such general words may, according to the intention of the parties, be restrained.

39 E. 3, 26. (a) Vide *infra*.

If there be two executors, and one of them release a debt due to the testator, this shall bind both, for each hath an entire authority and interest different from other joint-tenants; and hence it is held, that, if one executor release to his companion, nothing passes thereby, because each was possessed of the whole before.

Vide title *Executors and Administrators*, vol. 4.

||And unless a strong case of fraud is made out, the court will not control the legal power of one of several plaintiffs to release the action.

7 Taunt. 421; 4 Moo. 192. Vide 1 Chitt. 390, 391; || *Herbert v. Pigott*, 2 C. & M. 384; 4 Tyr. 285; *Barker v. Richardson*, 1 Y. & J. 362; *Crook v. Stephen*, 5 Bing. N. S. 688; *Wild v. Williams*, 6 Mees. & W. 490.*g*

But if there be two executors, and one of them refuse to join in action, upon which he is severed, after such severance he cannot release the action.

Dyer, 319, pl. 15; Cro. Car. 420.

In the case of *Williams v. Penn* it was adjudged, in B. R., that if there be two administrators, and one of them release a bond due to the intestate, that this shall bind his companion, and be a good discharge to the obligor; as the statute 31 E. 3, cap. 11, gives an administrator the same power over debts due to an intestate as an executor had, and as an administrator by releasing without consideration is equally liable to a *devastavit* with an executor.

Pasch. 11 G. 2, in B. R., *Williams v. Penn*.—In the case of *Hudson v. Hudson*, Mich. 1737, in Canc., Lord Hardwicke was of a contrary opinion, on the difference the law makes between an executor and an administrator, the former coming in not by the act of the ordinary, but by the will of the testator, consequently his authority and interest in the assets greater, &c. [The law, however, is as stated in the text; the opinion of Lord Hardwicke in *Hudson v. Hudson*, was applicable only to the particular circumstances of that case. *Jacomb v. Harwood*, 2 Ves. 265.]

§One administrator may release or dispose of the estate of an intestate without the concurrent act of the other.

Bondereaux v. Montgomery, 4 Wash. C. C. 686; *Edmonds v. Cranshaw*, 14 Peters, 166; *Murray v. Blatchford*, 1 Wend. 583; *Gage v. Johnson*, 1 M'Cord, 492; *Moore v. Sandy*, 3 Bibb, 97; *Gleason v. Lillie*, 1 Aik. 28.

But not by receiving a proved account in payment.

Mangram v. Sims, 1 Car. Law Rep. 547.

Nor can one of two executors transfer by endorsement a negotiable note made to two executors jointly.

Smith v. Whiting, 9 Mass. 334.*g*

(F) How far the Husband's Release shall bind a Wife.

An infant executor, upon an actual payment and full satisfaction made to him, may release a debt due to his testator, but cannot without, for that this would be a *devastavit* in him.

5 Co. 27; Co. Lit. 172; And. 177; Moor, 146.

As, if a bond be forfeited, and the infant executor only receive the principal sum without the penalty, and give a general release of all the debt; this release at law is no bar of the penalty. (a)

Cro. Car. 490, *Kniverton v. Latham*. (a) But now, since stat. 4 Ann. c. 16, whereby the penalty is saved on payment of principal and interest. *Qu.* If principal and all interest be paid to such infant executor, if his release will not operate as in the preceding case?

If an executor release a debt due to the testator, this shall charge him to the value of the debt, though perhaps he did not receive near so much as was due; but if he release an account, this resting in uncertainty, he cannot be charged with more than he actually receives.

Hob. 66; Cro. Eliz. 43; And. 188.

If an executor voluntarily release a debt, he shall not be relieved against it in equity, although a creditor may.

Vern. 455.

It hath been held in Chancery, that if there are two executors, and they join in a receipt, and one only receives the money, that as to creditors, who are to have the utmost benefit of the law, each is liable for the whole, though one executor alone might release, and the joining the other was unnecessary; but as to legatees, and those claiming distribution, who have no remedy but in equity, the receipt of one executor shall not charge the other, for the joining in the receipt is only matter of form; the substantial part is the actual receiving, and this only is regarded in conscience.

Salk. 318, pl. 26, *per* Ld. Harcourt; β Appeal of Brown's Executor, 1 Dallas, 311; Vernon's Estate, 6 Watts, 250; M'Nair's Appeal, 4 Rawle, 148; Sterrett's Appeal, 2 Penn. 421; Douglass v. Satterlee, 11 Johns. 16; Knox v. Pickett, 4 Desauss. 92; South's Heirs v. Hoy's Heirs, 3 Monr. 95; Clark's Exec. v. Farrer, 3 M. 248; Evans v. Evans, 1 Desauss. 520; Sutherland v. Brush, 7 Johns. Ch. 22; Ochiltree v. Wright, 1 Dev. & Bat. 336; Messey's Admin. v. Cureton's Exec., 1 Cheves Ch. Ca. 181; O'Neal v. Herbert, 1 C. W. Dudley Eq. 30. When two administrators are jointly bound in the same bond, each is liable for the acts of the other. *Anderson v. Miller*, 6 J. J. Marsh, 571; *Morrow's Admin. v. Peyton's Admin.*, 8 Leigh, 54. See title *Executors & Administrators*, vol. 4, p. 41.g

(F) How far the Husband's Release shall bind the Wife.

By the intermarriage, the husband acquires such an interest in all debts due to the wife, that he may release them, and such release shall bind the wife.

17 E. 3, 66; 2 Roll. Abr. 410.

Baron alone may release waste done by lessee for life before coverture, upon a lease made by the feme.

42 E. 3, 18; 2 Roll. Abr. 402.

So, all rights accruing to the wife during coverture may be released by the husband.

Salk. 115, pl. 4; Ld. Raym. 73; β Cassall's Admin. v. Carroll, 11 Wheat. 134; Lodge v. Hamilton, 2 Serg. & R. 493; Krumbaar v. Burt, 2 Wash. C. C. 406; Siter's case, 4 Rawle, 475; Udall v. Kenny, 3 Cowen, 590; Southward v. Packard, 7 Mass. 95; Whitaker v. Whitaker, 6 Johns. 112; Swann v. Guage, 1 Hayw. 3; Forrest v. Warrington, 2 Desauss. 262; Lyttle v. Rorstan, 1 Marsh. 518; Enlaws v. Enlaws, 2 Marsh. 229; Williams v. Morgan, 1 Litt. 168; Leadenham v. Nicholson, 1 Har. &

(F) How far the Husband's Release shall bind the Wife.

Gill, 267; Marshall v. Lewis, 4 Litt. 146; May's Heirs v. Frazer, 4 Lit. Rep. 400. See Casey v. Conville, 2 Car. Law Rep. 405; Blount v. Haddock, Cam. & Nor. 75; Neale v. Haddock, 2 Hayw. 183; Haynes v. Lewis, 1 Taylor, 44; Tyson v. Tyson, 2 Hawks, 472; Byrne's Adm. v. Stewart, 3 Desauss. 135; Agar v. Blothyn, 2 C. M. & R. 699; 1 Tyr. & G. 160; Irgree v. Irgree, 6 M. R. 667; Legg v. Legg, 8 Mass. 99; Howes v. Bigelow, 13 Mass. 384; Schuyler v. Hoyle, 5 Johns. Ch. 196; Malony v. Kennedy, 10 Sim. 254; Russel v. Brooks, 7 Pick. 65; Peirce v. Thompson, 17 Pick. 391; Clapp v. Stoughton, 10 Pick. 463.*g*

The husband may release the wife's right under the statute of distributions.

Lucas, 63.

If a husband and wife are divorced *a mensa et thoro*, and a legacy is left to her, the husband may release it.

Moor, 665; Cro. Eliz. 908; Noy, 45.

So, where a legacy was given to a feme covert who lived separate from her husband, and the executor paid it to the feme, and took her receipt for it; yet, on a bill brought by the husband against the executor, he was decreed to pay it over again with interest.

Vern. 261.

β A legacy until it is recovered is a chose in action, and the marital right of the husband does not attach until it is reduced into possession, but he may sue for and reduce it into possession.

Gallego v. Gallego, 2 Brock. 285; Lodge v. Hamilton, 2 Serg. & R. 493; Wintercast v. Smith, 5 Rawle, 182; Whitaker v. Whitaker, 6 Johns. 112; Hayward v. Hayward, 20 Pick. 517; Harleston v. Lynch, 1 Desauss. 244; Evans v. Kingsbury, 2 Rand. 120; Browne v. Meredith, 2 Keene, 527; Bank's Adm. v. Marksbury, 3 Lit. Rep. 281; 1 J. J. Marshall, 330; Casey v. Tenville, 2 Car. L. R. 404; Burnett v. Roberts, 4 Dev. 81; Rivel v. Rivel, 2 Dev. & Bat. 272; Dare v. Allen, 1 Green Ch. 415. But see Commonwealth v. Manly, 12 Pick. 173.

A bequest to the wife cannot be attached by a creditor of the husband.

Dennison v. Nigh, 2 Watts, 90; Robinson v. Woelpper, 1 Whart. 179; Roans v. Archer, 4 Leigh, 559. But see *contra*, Whaler v. Bowen, 20 Pick. 563; Holbrook v. Waters, 19 Pick. 354.

A husband suing for a legacy due to his wife will be directed to make a settlement on her.

Tattnall v. Fenwick, 1 Desauss. 143; Bethune v. Berresford, Ibid. 174; McElhattan v. Howell, 4 Hayw. 19; Schuyler v. Hoyle, 5 Johns. Ch. 210; Howard v. Moffitt, 2 Johns. Ch. 206; Turrell v. Turrell, Ibid. 391; Sawyer v. Baldwin, 20 Pick. 378.

A bond conditioned that the husband shall be permitted to enjoy a portion of land during his life, and his wife during her's, cannot be released by the husband, so as to defeat the interest of the wife.

Conway v. Hale, 4 Hayw. R. 1, and see Roans v. Archer, 4 Leigh, 550.*g*

If a feme covert sues a woman in the spiritual court for adultery with her husband, and obtains a sentence against her and costs, the husband may release those costs, for the marriage continues, and whatever accrues to the wife during coverture belongs to the husband.

Salk. 115, pl. 4, *per* Holt, C. J.; Ld. Raym. 73.

But if the husband and wife be divorced *a mensa et thoro*, and the wife have her alimony, and sue for defamation or other injury, and there have costs, and the husband release them, this shall not bar the wife; for these costs come in lieu of what she hath spent out of her alimony, which is a separate maintenance, and not in the power of her husband.

Roll. R. 426; Roll. Abr. 343; 3 Buse. 264. β See Cotton et ux. v. Moon, Opinions

(G) To whose Benefit a Release shall inure.

in Mayor's Court of N. Y. 11; Dumond v. M'Gee, 4 Johns. Ch. 318. But see Turtle v. Muncey & Wife, 2 J. J. Marsh. 82.*g*

||Where a husband and wife lived separate under a deed, by which the husband stipulated that his wife should enjoy, as her separate property, all effects, &c. which she might acquire, or which by any gift, grant, or representation she or he in her right might be entitled to, and that he would not do any act to impede the operation of the deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering any property; the wife having, as executrix of A. B. commenced an action on a promissory note in the names of her husband and herself, the husband released the debt, which release was pleaded *puis darrein continuance*. The court ordered the plea to be taken off the file, and the release to be given up to be cancelled, as being in fraud of the deed of separation.

Innell v. Newman, 4 Barn. & A. 419; and vide 9 East, 470.

A general release given by a trustee in fraud of his trust to lessees of the trust estate, is void, and if pleaded by the lessees, will be ordered to be taken off the file.

Manning v. Cox, 7 Moo. 617.

See title **BARON AND FEME**, VOL. 2.||

(G) To whose Benefit a Release shall inure; and who shall be bound thereby, though not a Party to the release.

IF two or more are jointly and severally bound in a bond, a release to one discharges the others; and in such case the joint remedy being gone, the several is so likewise.

Co. Lit. 232; Moor, 856; 2 Roll. Abr. 410; Hob. 10; 2 Sid. 41; 2 Salk. 574; *Willings v. Consequa*, 1 Pet. C. C. R. 302; *U. States v. Thompson*, Gilpin, 621; *Jay v. Wurtz*, 2 Wash. C. C. R. 269; *Anderson v. Levan*, 1 Watts & S. 334; *Burson v. Kincaid*, 3 Penn. R. 60; *Rowley v. Stoddart*, 7 Johns. 207; *Harrison v. Close*, 2 Johns. 448; *Catskill Bank v. Messenger*, 9 Cowen, 37; *Tuckerman v. Newhall*, 17 Mass. 581; *Abel v. Fergie*, 1 Root, 502; *M'Shaine v. Woods*, Pr. Dec. 277; *Clagett v. Salmon*, 5 Gill & J. 314; *Crane v. Alling*, 3 Green, 423, and see *Garnett v. Macon*, 6 Call, 308. But this is not applicable to cases of joint trusts when the party released was not in default. *Kirby v. Turner*, Hopk. 309, S. C.; 6 Johns. Ch. 242. But taking a judgment in a joint and *several* action from one of the obligors in a joint and *several* bond will not discharge the others. *Rhoads v. Frederick*, 8 Watts, 448. A receipt in full to one joint obligor on his paying his proportion of the debt is not a discharge of the others. *Chandler v. Herrick*, 19 Wend. 129; *Shotwell v. Miller*, Coxe, 81. Nor is a release of one joint debtor with the consent of his co-debtor. *Rogers v. Hosack's Exec.*, 18 Wend. 319; *Bank of Chenango v. Osgood*, 4 Wend. 607. An agreement not to sue one of several promissors is not a release of the others. *Catskill Bank v. Messenger*, 9 Cowen, 37; *De Zeng v. Bailey*, 9 Wend. 336; *Bank of Chenango v. Osgood*, 4 Wend. 607; *Couch v. Mills*, 21 Wend. 424; *Harrison v. Close*, 2 Johns. 448; *Ward v. Johnson*, 6 Munf. 8; *Tuckerman v. Newhall*, 17 Mass. 581; *Dewey v. Derby*, 20 Johns. 462. But see *Cuyler v. Cuyler*, 2 Johns. 186; *Jackson ex dem. Roosevelt v. Stackhouse*, 1 Cowen, 122; *Phelps v. Johnson*, 8 Johns. 54; *Clark v. Bush*, 3 Cowen, 151; *Clopper v. The Union Bank*, 7 Har. & J. 103; and see *ante*, page 249.*g*

So, if there are two conusees of a statute, and one of them releases to the conusor; this shall extinguish the statute as to the other also.

2 Roll. Abr. 411.

So, if two executors sell the goods of the testator for a certain sum of money, and take an obligation for the money, the release of one of them shall bar both.

17 E. 3. 66; 2 Roll. Abr. 411.

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So, where there are two executors, and one only has the possession of the goods which are taken away by a stranger; though he only in whose possession the goods were may bring an action, yet the release of his companion shall bar him.

Bro. Release, 26. *β* See *antè*, (E) *Of Releases by Executors and Administrators.g*

Also, if two are bound in an obligation, and the obligee releases to one of them, proviso that the other shall not take advantage of it, this proviso is void.

Lit. R. 190; *||sed vide* 2 Brod. & B. 38.*||*

β If a holder of a note release one of several joint makers, excepting from such liability as he may be under to the endorsers, those endorsers cannot in an action against them by the holder set up such release in discharge.

Stewart v. Eden, 2 Caines, 121.

Where there are two joint debtors, and the creditor has the means of satisfaction in his hands by legal process levied on the property of one, and chooses not to retain it, but suffers the property to pass out of his hands, the other debtor is discharged *pro tanto*.

Commonwealth v. Haas, 16 S. & R. 252. But see Ontario Bank v. Hallett, 8 Cowen, 192; Dixon et al. v. Ewing, 3 Ohio R. 280.

But a general indulgence given to the first signer of a bond will not release to others.

Rutlege v. Greenwood, 2 Desauss. 389.*g*

But if A be bound to B and C, *solvend.* the moiety to B and the other to C, this is a several obligation, and the release of one shall not prejudice the other.

Moor, 64.

So, where several enter into several covenants in the same deed, a release to one of the covenanters will not discharge the others.

Cro. Eliz. 408, 470; 2 Salk. 574.

So, if two are bound to the king, and he releases to one of them, this will not discharge the other.

5 Co. 56.

β A discharge from prison, by the Secretary of the Treasury, of the principal in a bond to the United States, does not release his sureties.

U. States v. Stansbury et al., 5 Peters, 575; U. States v. Sturges et al., Paine, 525.

The legislature may release a person from imprisonment who has been convicted of a crime, although one half of the fine imposed goes to the prosecutor.

Rankin v. Beaird, Breese R. 123.

If one of several joint obligors is discharged by operation of law, and without the consent or act of the obligee, it does not release the others.

Ward v. Johnson, 13 Mass. 148, 152.*g*

If A and B are named obligors jointly and severally, and A only seals the bond, and then the obligee releases to A, and after B seals the deed, this release shall inure to the benefit of B though it was not his deed at the time of the release; for the release does not defeat the deed, but is only a bar by plea, and both were bound for one and the same debt, which is satisfied by the release.

2 Roll. Abr. 412; Cro. Eliz. 161.

If divers commit a trespass, though this be joint or several at the election of him to whom the wrong is done, yet, if he releases to one of them,

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all are discharged; because his own deed shall be taken most strongly against himself. Also, such release is a satisfaction in law, which is equal to a satisfaction in fact. But he who would take advantage of such release must have the same to produce.

Co. Lit. 232; Hob. 66; Noy, 62; 5 Co. 97; Brownl. 189; Cro. Ja. 444. {See 3 Johns. Rep. 175, *Wilson v. Reed*.}

β A release to a person as a joint trespasser, who is not in fact liable to the releasor, will not destroy his right of action against those who are liable.

Wilson v. Reed, 3 Johns. 175. As to the legal effect of a release of a co-defendant in an action of trespass after judgment, see *Allen v. Craig*, 2 Green, 102.*g*

If trespass be brought against three, and judgment be given against one, and the plaintiff enter a *noli prosequi* against the other two, if the *noli prosequi* be before judgment, it will discharge the whole action. So, if judgment had been against all three, and the plaintiff had entered a *noli prosequi* against the two; for nonsuit or release, or other discharge of one, discharges the rest.

Hob. 70, *Parker v. Laurence*. || *Qu.* Whether this doctrine is correct, except as to actions of *contract*? ||

β In *assumpsit* against two, upon a joint contract, if one confess a final judgment upon which execution is issued, and the other plead the general issue, and go to trial, no judgment can be entered against him.

M'Fall v. Williams, 2 Serg. & R. 280.

So in an action of *debt*.

Shively v. U. States, 5 Watts, 332.

So a judgment against one partner is a bar to a subsequent suit against both, although the new defendant was a dormant partner, and not known at the time of the contract.

Smith v. Black, 9 Serg. & R. 142; *Lewis v. Williams*, 6 Whart. 264; *Anderson v. Levan*, 1 Watts & Serg. 334.

In an action on a joint and several bond against both obligors, one of whom only was served with process, a judgment against him is a bar to any further proceeding against the other.

Downey v. F. & M. Bank of Greencastle, 13 S. & R. 288.

A judgment in favour of the defendant in a suit against one of several co-obligors in a joint and several bond is a bar to a suit against the other, unless the judgment was on a plea personal to the first.

Hostetter v. Kaufman, 11 Serg. & R. 146.*g*

In trover against two, one pleaded not guilty, and a verdict against him; the other pleaded a release, and verdict for him: on motion for judgment against him who was found guilty, it was denied, because the trover being joint, a release of all actions discharged both.

4 Mod. 379, *Kiffin v. Willis*.

In replevin by A against B, B makes consuance in right of C for *damage-feasant* to the freehold of C, which is adjudged against A, and judgment that B shall have return irreplegiabie with costs and damages. In a *scire facias* brought by B to have execution of the costs and damages, if A pleads the release of C, in whose right consuance was made of all demands, this is no bar, inasmuch as C was not party to the suit, nor liable to any costs or damages, had the matter been adjudged against B, and

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therefore B was entitled to the costs and damages, which C could not release.

2 Roll. Abr. 412; Sibley v. Rawlins, 2 Lutw., S. C. cited, and said, that if C had been party to the original suit, it would have been otherwise.

A and B took an obligation from J S for the payment to them of a sum of money, and this was done by them as trustees, and for securing the payment of legacies to younger children; A brought an action on this bond, to which J S pleaded a release from B, but upon *oyer* it appeared that the release was of all actions which B had on his own account; and in truth B did not know of the taking the bond, nor was he privy to the suit; and though it was objected that the release of one obligee discharged the bond, and that it must be on his own account, yet it was adjudged, that the release did not bar, for that the words, *on his own account*, must have been put in for some purpose, and could not in this case be for any other, but to distinguish demands which B had in his own right from those he had in right of or in trust for others.

Vent. 35; Lev. 272; 2 Keb. 530; Stokes v. Stokes, 3 Mod. 279, S. C. cited.

A release of lands by one of two trustees from the operation of a mortgage, is not in itself a sufficient discharge of the lands, to render it available; it must be executed by both trustees.

Van Rensselaer v. Akin, 22 Wend. 549.

Where a suit is commenced in the name of several plaintiffs, all of whom are interested in the judgment, a release by a part of them will defeat the action.

Eastman v. Weight, 6 Pick. 316.*g*

Where divers are to recover in the personalty, the release of one is a bar to all, but it is not so in point of discharge.

6 Co. 25 a, Ruddock's case; Cro. Eliz. 648; Jenk. 263; Palm, 319; Owen, 22; Hutton, 40.

As, if there are two plaintiffs who are barred by an erroneous judgment, and they afterwards bring a writ of error, the release of one shall bar the other; because they are both actors in a personal thing to charge another, and it shall be presumed a folly in him to join with another who might release all.

3 Mod. 135.

But if an action be brought against four, and judgment against them, on which they bring a writ of error, and the defendant in error plead the release of one of them, this is no bar; for it being brought to discharge themselves of a judgment, the release of one cannot bar the other, because they have not a joint interest but a joint burden, and by law are compelled to join in a writ of error.

3 Mod. 109.

||Unless a strong case of fraud is made out, the court will not interfere with the legal right of one of several co-plaintiffs to release an action.

7 Taunt. 421; 4 Moor, 192. Vide 1 Chitt. 390, 391. || *β* Jay v. Wurtz, 2 Wash. C. R. 269; Phettisplace v. Sales, 4 Mason, 312; Carter v. Connell, 1 Wharton, 392; Belden v. Davies, 2 Hall, 433; Wild v. Williams, 6 Mees. & W. 490; Crook v. Stevens, 5 Bing. N. S. 688; Herbert v. Pigott, 2 C. & M. 384; Barker v. Richardson, 1 Y. & J. 362; Greene v. Beatty, Coxe, 142; Eastman v. Wright, 6 Pick. 316. Loring v. Brackett, 3 Pick. 403. But see Sumner v. Stewart, 2 New Hamp. R. 39. Skillman v. Temple, Saxton Ch. 232.*g*

(H) How far a Possibility or Contingent Interest may be released.

It is a general rule in our books that a mere possibility cannot be released, and the reason hereof is, that a release supposeth a right in being, and it was thought to countenance maintenance to transfer choses in action, possibilities, and contingent interests.

10 Co. 48 a; Cro. Eliz. 552; *β* Pellitrea v. Jackson, 11 Wend. 110. But when there is a present right to take effect in *futuro*, it may be released. Woods v. Williams, 9 Johns. 123.*g*

Hence it is held, that an heir at law cannot release to his father's disseisor in the lifetime of the father; for the heirship of the heir is a contingent thing, for he may die in the lifetime of the father, or the father may alien the lands.

Lit. sect. 446; Co. Lit. 265 a; 10 Co. 51; Bridgm. 76, S. P., though the words *quæ quovismodo in futuro habere potero* are inserted in the release.—But if the heir releases with warranty, it bars him when the right descends. 2 Leon. 20; Hob. 130; *β* Trull v. Eastman, 3 Met. 121, 124.*g* || See 8 East, 552.||

So, if the conusee of a statute releases to the conusor all his right to the land, yet he may afterwards sue execution, for he has no right to the land, but only a possibility.

And. 133; Co. Lit. 265; Cro. Eliz. 552; 2 Roll. Abr. 405.

So, if a creditor releases to his debtor all the right and title which he hath to his lands, and afterwards gets judgment against him, he may extend a moiety of the same land, for he had no right to the land at the time of the release, and the land is not bound but in respect of the person.

2 Mod. 281; 2 Lev. 215.

So, if the plaintiff release all demands to the bail in the King's Bench, and afterwards judgment be given against the principal, execution may be sued against the bail, for that at the time of the release there was only a possibility of the bail becoming chargeable.

5 Co. 70, Hoe's case; Co. Lit. 265; Moor, 469; Cro. Eliz. 579; Moor, 469; Hutt. 17; and vide the case of Harrison v. Huxley, Moor, 852.—** *Sed qu.* if the release was on consideration and intended to discharge them as bail; if the court, on motion, would not stay proceedings against them?*

So, if A recovers in trespass against B in B. R., and B brings a writ of error, pending which A releases to B all executions, and after the judgment is affirmed and new damages given to A for the delay upon the statute of 3 H. 7, [cap. 10, and vide 19 H. 7, cap. 20,] this release shall not bar A to have execution of those damages, because he had not any right to have execution, nor to any duty at the time the release was made.

2 Roll. Abr. 404; Cro. Ja. 337; Roll. R. 11, Child v. Durant.

A lease to the husband and wife for life, the remainder to the survivor of them for twenty-one years; the husband grants it over, and though he survived, yet the grant was held void because it was contingent.

Poph. 5; 10 Co. 51; Hutt. 17; Raym. 146; *β* Conway v. Hall, 4 Hayw. R. 1.*g*

If the next presentation to a church be granted to A and B, and living the incumbent A release all his estate, title, and interest to B, this release is void, it being of a chose in action: *secus*, had the release been made after the avoidance, at which time the interest would have been vested in A.

Cro. Eliz. 173, 600; Owen, 85; Leon. 167; 3 Leon. 256, and Dyer, 244; 10 Co. 48, like point.

From the reasons herein it was held, that if at common law a woman before marriage had accepted of a jointure in bar and satisfaction of dower,

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this would not have bound her, because at the time she had no right to dower.

4 Co. 1, Vernon's case. If a husband makes a lease for life and dies, the wife may release her right of dower to him in reversion, though she has no present cause of action against him. Co. Lit. 265.

β The right to dower until assigned rests in action only. It may be released but cannot be assigned.

Cox v. Jagger, 2 Cowen, 638; Douglass v. M'Coy, 5 Ohio R. 527; Satliff v. Forgey, 1 Cowen, 89; Ela v. Casel, 2 N. H. R. 176; Shepherd v. Howard, Ibid. 507; Browne v. Meredeth, 2 Keene, 527; and see Pixley v. Bennett, 11 Mass. 298; Rowe v. Hamilton, 3 Greenl. 63; Douglass v. Scott, 5 Ohio, 197; Powell v. The Monson & B. Man. Company, 3 Mason, 347.

A release of a demandant for dower to a stranger of her right is no defence to a demand of dower.

Pixley v. Bennett, 11 Mass. 298.

A jointure will bar dower in the case of an infant wherever it would do so in the case of an adult.

Shaw v. Boyd, 5 Serg. & Rawle, 311; M'Cartee v. Tellar, 2 Paige, 511.

A release of dower must be pleaded.

Hitchcock v. Carpenter, 9 Johnson, 344.

A contract for forbearance by a widow, to claim her dower for a term of years, cannot be construed into a release of it.

Croade v. Ingraham, 13 Pick. 33; Walker v. Russell, 17 Pick. 280.*g*

A city orphan cannot at law release her orphanage part to her father, for she hath no right in her during the lifetime of her father. But it hath been held in equity, that such release being for a valuable consideration, as upon the marriage of a daughter, and a portion given her by the father, it may operate as an agreement to waive the orphanage, and hath accordingly been so decreed.

Blanden v. Barker, 1 P. Wms. 638; Preced. Chan. 545. [See *acc.* Cox v. Belitha, 2 P. Wms. 273; Lockyer v. Savage, 2 Stra. 947; Medcalfe v. Ives, 1 Atk. 63. *Secus*, if a mere *voluntary* release, Morris v. Burroughs, 1 Atk. 401.]

If there be a devise of a term for years to A for life, remainder to B, B may release his right to A, and such release shall extinguish his interest, though it was objected that B had only a possibility at the time of the release made.

10 Co. 47, Lampet's case.

But it was held in the above-mentioned case of Lampet, and hath in like manner been held in other cases, that B could not assign over his interest to a stranger in the lifetime of A, the same being only a chose in action, and a mere possibility, inasmuch as an estate for life is in supposition of law a larger estate than for any number of years.

14 Co. 47; 4 Co. 66; Sid. 188; Raym. 146.

But later resolutions, especially those which have been in courts of equity, have made a great alteration in this doctrine.

2 Vern. 563.

As in the case of Cole v. Moore, where one possessed of a term devised it to A for life, remainder to B, and made A executor; B devised this remainder to C and died in the lifetime of A, and in order to defeat C of his interest, A assigned his term to a third person: it was decreed by Lord Chancellor Ellesmere, that A, the executor and devisee for life, was a

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trustee for B, and should not be at liberty to destroy this remainder, but that the executor should preserve the lease, so as it might go according to the will, with the performance whereof the executor was intrusted.

Moor, 806.

So, in the case of *Goring v. Bickerstaff*, where a trust of a term was devised to A for life, remainder to B, it was agreed by all that B might assign over his trust, which shows that a trust of a term in remainder may be transferred over by deed.

Chan. Ca. 4.

One possessed of a term for years devised it to A for life, remainder to B. B in the lifetime of A devised his remainder to J S, who devised it over; and the question was, Whether A (the devisee for life) being dead, the devisee of J S should have the term, or whether it should go to the administrator *de bonis non*? and it was decreed for the devisee of J S, and the administrator *de bonis non* of B was directed to assign over the term to him.

1 P. Wms. 572, *Wind v. Jekyl*.

And in the case of *Theobald v. Duffay*, in the House of Lords, March, 1729-30, it was (*inter alia*) determined, that a possibility of a term is assignable for a good consideration.

It is laid down in *Hoe's case*, that a duty uncertain at first, which upon a condition precedent is to be made certain afterwards, is but a possibility which cannot be released.

5 Co. 70; 2 Mod. 281.

β The contingent liability of the endorser of a promissory note may be released before the note becomes due.

Bank of Pennsylvania v. McCalmont, 4 Rawle, 307; and see *Cuyler v. Cuyler*, 2 Johns. 186.

But a mere naked possibility of interest in premises is not the subject of release.

Pellitrea v. Jackson, 11 Wend. 110.*g*

As a *nomine pœnæ* waiting on a rent, which cannot be released till the rent is behind, as the non-payment of the rent makes the *nomine pœnæ* a duty.

Yelv. 215; *Brownl.* 116, *Bridges v. Enion*.

So, if a man covenants to pay 10*l.* on the birth of a child, the covenant cannot be released of the 10*l.*, it resting merely in contingency whether such child will ever be born or not.

Yelv. 192, *Neale v. Sheffield*.

So, if an award be, that upon the plaintiff's delivering the defendant by a certain day a load of hay, the defendant shall pay him 10*l.*; in this case the 10*l.* cannot be released before the day; for it rests merely in possibility and contingency whether the money shall ever be paid, for it becomes a duty on the delivery of the hay only, and not before.

Yelv. 215.

β If A covenant with B and C to do a certain act by a certain day, and B afterwards releases A from the performance within the time mentioned, or extends the time of performance, such release is a bar to an action on the covenant, for non-performance within the time.

Fitch v. Forman, 14 Johnson, 172; and see *Woods v. Williams*, 9 Johns. 123.*g*

(I) How the operative Words have been construed.

In debt upon a bond against the defendant as administrator, &c., the defendant pleaded a release, whereby the plaintiff, reciting there were several controversies between the defendant and him about a legacy and the right of administration, releases to the defendant all his right, title, interest, and demand of, in, and to the personal estate of the intestate; and on demurrer this was held to be no plea. A difference was taken by Ch. Jus. Holt, between a release of all demands to the person of the obligor or administrator, and a release of all demands to the personal estate of the obligor or administrator, that the last will not discharge the bond as the other may, because the bond does not give any right or demand upon the personal estate, &c., until judgment and execution sued.

2 Salk. 575, pl. 4; 2 Ld. Raym. 786, *Topham v. Tallier*.

If A promises B, in consideration that he will sell to his son certain merchandise at such a price, that if his son does not pay it at the feast of St. Michael next ensuing, he himself will pay it; and before Michaelmas B releases all actions and demands to him who made the promise, this shall not release the *assumpsit*; for till Michaelmas it cannot be known whether his son will pay it or not, and till default of payment by him the other is not bound to pay it, and so it is a mere contingency till Michaelmas, which cannot be released.

2 Roll. Abr. 407, 408, *Briscot v. Aier*.

A bond, conditioned not to sue unless on a future contract, is a perpetual covenant amounting to an absolute release of all existing causes of action.

Cuyler v. Cuyler, 2 Johns. 186; *Jackson v. Stackhouse*, 1 Cowen, 122; *Linde v. Linde*, 1 Beav. 496; *Hastings v. Dickinson*, 7 Mass. 153; *Shed v. Pierce*, 17 Mass. 163; *Sewell v. Sparrow*, 16 Mass. 24; *Upham v. Smith*, 7 Mass. 265; and see *Bank of Pennsylvania v. M'Calmont*, 4 Rawle, 307.*g*

(I) How the operative Words in a Release have been construed: And therein of the Words.

1. *Claims and Demands, what are released thereby.*

LITTLETON says, that a release of all demands is the best release to him to whom it is made; and Lord Coke says, that the word *demand* is the largest word in law except *claim*; and that a release of demands discharges all sorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognisances, statutes, commons, &c.

Lit. sect. 508; Co. Lit. 291.

But, notwithstanding the large import of the word *demands*, yet there are several instances (which *vide infra*) where the generality of the words hath been restrained to the particular occasion for which the release was made.

Where there are general words alone in a release they shall be taken most strongly against the releasor; but where there is a particular recital and then general words follow, these shall be qualified by the recital.

Lessee of Rossevelt v. Stackhouse, 1 Cowen, 122; *M'Intyre v. Williamson*, 1 Edw. 34; *Hyde v. Baldwin*, 17 Pick. 303; *Rich v. Lord*, 18 Pick. 322; *Lyman v. Clark*, 9 Mass. 235; *Averill v. Lyman*, 18 Pick. 346; *Rice v. Woods*, 21 Pick. 30; *Wiggon v. Tudor*, 23 Pick. 434; *Russell v. Coffin*, 8 Pick. 143. The intent must be ascertained from the words of the release itself. *Van Brunt v. Van Brunt*, 3 Edw. 14.

In Massachusetts *parol* evidence is admissible to show what was intended to be released under a general description.

West Boylston Man. Co. v. Searle, 15 Pick. 225.*g*

(I) How the operative Words have been construed.

By a release of all demands, all actions real, personal, and mixed, and all actions of appeal, are extinct.

8 Co. 154.

β The word *demand* is very comprehensive, and includes every thing which creditors would have a right to recover by suit.

Per Tilghman, C. J., in *Scott v. Morris*, 9 Serg. & R. 124; and see 3 Penn. 120; 2 Hill, 228, and *Bouv. Law Dic.* title "*Demand.*"*g*

So, a release of all demands extends to inheritances,(a) and takes away rights of entry, seizures, &c.

Co. Lit. 291. (a) But if the king releaseth all demands, yet as to him the inheritance shall not be included. *Bro. Prerogative*, pl. 62, *Bridgm.* 124.

|| A reversion shall not be included in the general terms of the release of a debt.

8 Ves. 417.||

By a release of all demands made to the tenant of the land, a common of pasture shall be extinct.

Co. Lit. 291.

A release of all demands will bar a demand of a relief, because the relief is by reason of the seignory to which it belongs.

Cro. Ja. 170.

If A, being possessed of goods, loses them, and they come to the hands of B, who being in possession, A by deed releases to B all actions and demands personal which at any time before *habuit vel habere potuit* against B, for any cause, matter, or thing whatsoever; this shall bar A of the property of the goods, so that B has the absolute right in him by this release.

2 Roll. Abr. 407, *Jordon v. Sanders*.

By a release of all demands all manner of executions are gone; for the recoveror cannot sue out a *fieri facias*, *capias*, or *elegit*, without a demand.

Lit. sect. 508; 2 Roll. Abr. 407

By a release of all demands, to the conusor of a statute merchant before the day of payment, the conusee shall be barred of his action, because that the duty is always in demand; yet, if he releases all his right in the land, it is no bar.

Co. Lit. 291; *Bridgm.* 124.

So, a bond conditioned to pay money at a day to come, is a debt and duty presently, and may be discharged by a release of all actions and demands before the day of payment.

Cro. Ja. 300; β *Fitch v. Forman*, 14 Johns. 172; *Woods v. Williams*, 9 Johns. 123.*g*

But in an action of debt for non-performance of an award made for the payment of money at a day to come, there is no present debt, nor any duty before the day of payment is come, and therefore it cannot be discharged before the day, by a release of all actions and demands.

Yelv. 214; *Cro. Ja.* 300.

So, if a man devises a legacy of 20*l.* to J S, at the age of twenty-three, though the legatee, after he attains the age of twenty-one, and before the day of payment, may release it, yet by the word *demands* it is not released but there must be special words for the purpose.

10 Co. 51, in *Lampet's* case.

(I) How the operative Words have been construed.

A release of all demands does not discharge a covenant not broken (*a*) at the time; as, where a lessor, on payment of 60*l.* to him by the lessee due on a judgment, release to him all demands; it was adjudged, that this did not release a covenant for repairs not then broken. But it was held, that a release of all covenants would have released the covenant.

Hancock v. Field, Cro. Ja. 170; 2 Roll. Abr. 407; Noy, 123. (*a*) For the difference when broken or not, vide Dyer, 217; Lit. R. 86; Moor, 34; 3 Leon. 69; 10 Co. 51; 5 Co. 71; Hoe's case, Co. Lit. 292; 8 Co. 153; And. 8, 64. {So it does not discharge a bond of indemnity which is not forfeited. 4 Bos. & Pul. 113, Butcher v. Butcher.}

If lessee for life grants over his estate by indenture, reserving rent during the continuance of the estate, and afterwards releases to the assignee all demands; this shall discharge the rent, for he had the freehold of the rent in him at the time.

Witton v. Bie, 2 Roll. Abr. 408; Cro. Ja. 486; Bridgm. 123; 2 Roll. R. 20; Poph. 136.

So, if lessee for years grants over by indenture all his estate, reserving a rent during the term, and after releases to the assignee all demands, this shall release the rent; for though he cannot have an action to demand all the estate, yet this is an estate in him of the rent, and assignable over; and in an action of debt for any arrearages after, he shall claim it as a duty accrued from the said estate; and it shall not be said that the duty arises annually upon the taking of the profits, but this had its commencement and creation by the reservation and contract, which was before.

2 Roll. Abr. 408, in the case of Witton v. Bie.

If there be lessee for years rendering rent, and the lessor grant over the reversion, and the lessee attorn, and after lessee assign over his estate, and after the assignee of the reversion release all demands to the first lessee, yet this shall not release the rent, for that there is neither privity of estate nor contract between them after the assignment. But, if the release had been made to the assignee, it had extinguished the rent.

Collins v. Harding, 2 Roll. Abr. 408; Moor, 544; Cro. Eliz. 606.

If he who has a rent-charge in fee releases to the tenant of the land all demands from the beginning of the world till the making of the deed of release; this shall discharge all the rent, as well that to come as what is past.

20 Ass. pl. 5; 2 Roll. Abr. 408.

It is said by Littleton and Lord Coke, that by a release of all demands a rent-service shall be released; but this, it is said, is to be intended of a rent-service in gross as a seignory; and therefore in the case of

Hen v. Hanson, where, in covenant brought on a covenant in a lease for years to pay the rent reserved, the defendant pleaded a release by the plaintiff of all demands at a day before the rent in question became due; the plaintiff replied, that the release was in performance of an award of all matters in controversy between the plaintiff and defendant; upon demurrer, it was adjudged by Foster, Mallet, and Windham, that the rent was not discharged by this release, as it became due by the preception of the profits, and was not like to a rent-charge, or a rent-parcel of the seignory; and they held, that this rent being incident to the reversion, and part thereof, was no more released hereby than the reversion itself was; and that this construction should the rather prevail, as it was not the intention of the party to release this rent. But Twisden *contra*—he said, that

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in releases and deeds when words are heaped up, the party that is to take the advantage may take the strongest word and in the strongest sense, and that is the reason they are put in; and as to the intent, that must be gathered from the words; and men must take care what words they use, *oportet politiam obedire legibus non leges politiae*; and he said, he could see no difference between this rent and a rent in fee: both are rent-services, and neither demandable before they become due, otherwise than as in 40 E. 3, 47, it is said, there is a continual demand betwixt lord and tenant; and in this case there is a tenure between the lessee and him in reversion; and the reason why the reversion is not touched by this release is, because it can work only by way of extinguishment, and not by way of passing an interest. But it was adjudged *ut supra*.

Lit. sect. 510; Co. Lit. 291; Lev. 99, 100; Sid. 141; Keb. 499, 510, Hen v. Hanson.

The plaintiff declared upon a lease for years, *reddendum* 30s. at Lady-day and Michaelmas, and assigned for breach non-payment of a year's rent due and ending at Lady-day, 1689, the defendant pleaded a release, dated the 18th day of November, 1688, of all demands; and upon demurrer judgment was given for the plaintiff; for the growing rent not due, which is incident to the reversion, is not discharged, though the first half-year's rent, which was a duty demandable, was released; but here the release being pleaded as a bar to all, which it is not, the plea is naught, and judgment must be given for the plaintiff.

2 Salk. 578, pl. 1, Stephen v. Snow. β See Bouvier's Law Dic. tit. *Demand*; 1 Sid. 41; 1 Lev. 99; 3 Lev. 274.g

2. By a Release of all Actions and Suits.

A release of all actions discharges a bond to pay money on a day to come; for it is *debitum in presenti, quamvis fit solvendum in futuro*; and it is a thing merely in action, and the right of action is in him that releases, though no action will lie when the release is made.

Co. Lit. 292.

But a release of actions does not discharge a debt before the day of payment, for it is neither *debitum* nor *solvendum* at the time of the release; nor is it merely a thing in action, for it is grantable over.

Co. Lit. 292.

So, if a man has an annuity for term of years, for life, or in fee, and he, before it be behind, (a) releases all actions. This shall not release the annuity, for it is not merely in action, because it may be granted over.

Co. Lit. 293; Bulst. 178; Cro. Eliz. 897; Moor, 133. (a) But such release shall release the arrearages incurred before. 39 H. 6, 43; 2 Roll. Abr. 404.

If one releases *omnes querelas aut loquelas*, this is as large as a release of all actions, and releases all causes of action, though no action be then depending.

Co. Lit. 292.

|| And so a general release in the common form discharges all actions in respect of any thing that has happened before the date of the release, although the cause of action was not then complete. Thus, in an action by the payee against the drawer of a bill, such a release given to the acceptor, who had become bankrupt, and obtained his certificate, renders him a competent witness for defendant: for, if a verdict should pass against

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the drawer, and he should thus have a right of action against the acceptor, still this would have reference back to the acceptance, and be discharged by the release.

Scott v. Lifford, 1 Camp. 250; || *Bank of Pennsylvania v. M'Calmont*, 4 Rawle, 307; *Woods v. Williams*, 9 Johns. 123; *Cuyler v. Cuyler*, 2 Johns. 186; *Hyde v. Baldwin*, 17 Pick. 203; *Deland v. Amesbury Man. Co.*, 7 Pick. 244.*g*

By a release of all manner of actions, all actions, as well criminal as real, personal as mixed, are released.

Co. Lit. 287.

A release of actions real is a good bar in actions mixed: as assize of *novel disseisin*, waste, *quare impedit*, (a) annuity; and so is a release of actions personal.

Co. Lit. 284. (a) But not after the grantee has made his election. Jones, 215.

In an appeal of robbery or felony a release of all actions personal will not bar, because an appeal, in which the appellee is to have judgment of death, is higher than a personal action. But a release of all manner of actions, or of all actions criminal, or of all actions mortal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, will be a good bar of any such appeal.

Co. Lit. 287; 2 Hawk. P. C. c. 23, s. 137.

And in an appeal of *mayhem* a release of actions personal may be pleaded, because damages only are recovered.

Co. Lit. 288.

A release of all actions is regularly no bar of an execution, for execution is no action, but begins when the action ends.

Co. Lit. 289; 8 Co. 153.

Also, a release of all actions does not regularly release a writ of error; for it is no action, but a commission to the justices to examine the record; but if therein the plaintiff may recover, or be restored to any thing, it may be released by the name of action.

2 Inst. 40; Yelv. 209; Co. Lit. 288.

But a release of all actions is a good bar to a *scire facias*, though it be a judicial writ, for the defendant may plead to it, and it is in nature of a new original given by the statute.

Co. Lit. 290; Comb. 455.

So, in replevin, a release of all actions is a good bar, for the avowant is defendant, though in some respects he is plaintiff.

2 Roll. R. 75.

By a release of all suits a man is barred of a writ of error.

Latch, 110.

So, by a release of all suits a man is barred of execution, because it cannot be had without application to the court, and prayer of the party, which is his suit.

Co. Lit. 291; 8 Co. 153.

If a disseisee releases to the disseisor all actions, this is no release of his right of entry; for when a man has several means to come at his right, he may release one of them, and yet take benefit of the other.

Co. Lit. 28 b; 8 Co. 151.

(K) Where general Words of Release are restrained, &c.

So, if a man by wrong takes away my goods, if I release to him all actions personal, yet by law I may take the goods out of his possession.

Co. Lit. 28 b; Skin. 57, pl. 1.

If a man releases all actions, by this he shall release as well actions which he has as executor as those in his own right.

39 E. 3, 26; 2 Roll. Abr. 404; 2 Ld. Raym. 1307, S. C., cited by Powell, and said by him to be clearly so, unless there was an action of his own for the release to work upon.

βA general release by one partner to a debtor of the firm, where it does not appear that he had any separate demand, will discharge the debt due to the partnership.

Emerson v. Knowler, 8 Pick. 63.g

If a man releases all quarrels—a man's deed being taken most strongly against himself—it is as beneficial as all actions, for by it all actions, real, personal, and mixed, are released.

Co. Lit. 292.

So, if a man releases *omnes loquelas*, it is as large as *omnes actiones*, and extends as well to actions in courts of record as base courts.

Co. Lit. 292.

So, a release of *omnes exactiones* (a) is equal to a release of all actions.

Co. Lit. 292. (a) For *exactio derivatur ab exigendo*, and *exigere* signifieth to require or demand. Co. Lit. 292 a. βFor a reference to various cases in which a construction has been given to the usual operative words of a release, see Bouv. Law Dict. tit. *Release.g*

||In an action on the 9 Ann. c. 14, by the assignee of a bankrupt, to recover money lost by the bankrupt at play, the bankrupt, who had obtained his certificate, was called as a witness to prove the loss: it was held, that he was incompetent, but that his competency was restored by three releases: 1st, A release by the bankrupt to his assignee: 2d, A release from all the creditors to the bankrupt; 3d, A release from the assignee to the bankrupt.

Carter v. Abbott, 1 Barn. & C. 444; 2 Dow. & Ry. 575.||

(K) Release, in what Cases restrained to the special Purpose for which it was given.

ON the rule of law, that every man's deed shall be taken strongest against himself, and on what is laid down in Altham's case, (b) *generalis clausula*, &c., it hath been insisted, that general words in a release are to be taken strongest against the releasor, and are not to be qualified or restrained by any special recital.

Plow. 282; 10 H. 6, 42. (b) 8 Co. 148.

But herein the sure rule and distinction seems to be, that where there are general words all alone in a deed of release, they shall be taken most strongly against the releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital.

And. 64; Hob. 74; Dyer, 240; Mod. 99; 3 Mod. 277; Ld. Raym.; [2 Ves. 310;] βJackson *ex dem.* Roosevelt v. Stackhouse, 1 Cowen, 122; M-Intyre v. Williamson, 1 Edw. 34; Hyde v. Baldwin, 17 Pick. 303; Rich v. Lord, 18 Pick. 322; Layman v. Clark, 9 Mass. 235; Averill v. Lyman, 18 Pick. 346; Rice v. Woods, 21 Pick. 30; Wiggan v. Tudor, 23 Pick. 434; Russell v. Coffin, 8 Pick. 143.g

Indeed, in the case of Rotherham v. Crawley, where, upon a reference

(K) Where general Words of Release are restrained, &c.

to arbitration of some controversies relating to relief and heriot claimed by the lord of his tenant, a release was awarded, which was drawn up of *all reliefs, duties, and amercements*, and this release being pleaded to an action of debt on an obligation, it was insisted, though the word *duty* might in strictness extend to a bond debt, that yet it ought not to have this construction in the present case, it being placed between the words *relief* and *amercements*, which showed that the parties intended duties of the same nature; but it was adjudged otherwise; and that the word *duty* working an extinguishment of the bond at law, the force of the word was not to be controlled by the intention of the party.

Cro. Eliz. 370; Owen, 71, S. C.; Raym. 299, S. C. cited.

But in the following cases the intention of the party has been principally regarded:

As where in debt upon an obligation the defendant pleaded a release of all errors, and all actions, suits, and writs of error whatsoever; it was adjudged, that the release extended only to writs of error, and did not release the obligation, though the word *actions*, had it stood singly, would have done it.

Hetl. 9, 15, Abree v. Page.

If a man receives 10*l.* of another, and by his deed acknowledges the receipt thereof, and thereof releases, acquits, and discharges him, and of all actions, suits, debts, duties, and demands; by this release nothing is discharged but the 10*l.*, and the action and demands thereof, for the last words have reference to the first, and so are limited by them.

2 Roll. Abr. 409, cited by Tanfield to have been adjudged Trin. 5 Jac. 1, in B. R.; 3 Mod. 277; Carth. 119; Show. 155, S. C. cited, and doubted of by Holt, C. J., who said that no such case was to be found.

3 A release acknowledging the receipt of one dollar in full of a certain judgment, (describing it,) and also in full of all debts, demands, executions, and accounts whatsoever—held, to be restrained by the particular words to the judgment only.

Lessee of Roosevelt v. Stackhouse, 1 Cowen, 122; M^cIntyre v. Williamson, 1 Edw. 34.

The intention must be ascertained from the release itself, and cannot be shown by extrinsic evidence.

Van Brunt v. Van Brunt, 3 Edw. 14. But see *contrà*, West Boyleston Man. Co. v. Searle, 15 Pick. 225.*g*

In the case of Hen v. Hanson, it was held, that a release, made in performance of an award, did not discharge a growing rent, though the release contained general words, for this reason (*inter alia*) that it was not the intention of the parties.

Lev. 99; Sid. 141.

So, in the case of Morris v. Wilford, a release to the wife's customary part, with general words, was held only to extend to the special matter recited.

2 Jon. 104; 2 Lev. 214; 2 Show. 46, pl. 32; 3 Keb. 814, 840.

|| So, where a release recited that the defendant stood indebted to his creditors, (of whom the plaintiffs were two,) in the several sums set opposite to their respective names; and that they had agreed to take of defendant 15*s.* in the pound on the whole of their respective debts; and the creditors, in consideration of the said 15*s.* in the pound, did release defendant from all manner of actions, debts, claims, and demands in law

(K) Where general Words of Release are restrained, &c.

and equity, which they, any or either of them, had, or should or might have, against him, by reason of any thing from the beginning of the world to the date of the release. The plaintiffs sued the defendant on a bond, and he pleaded this release; to which the plaintiffs replied, (setting out the release on oyer,) that the bond was given by defendant as surety for one H, to secure the repayment of bills drawn by him on the plaintiffs, and of all moneys which they should advance to H; and that the sum set against their names in the release was due to the plaintiffs on defendant's own account; and the moneys secured by the bond were not, nor was any part thereof, included in the sum set against their names in the deed. On demurrer to this replication, it was held sufficient; and that the general words of the release were restrained by the special recital, and did not extend to the bond-debt.

Payler v. Homersham, 4 Maule & S. 423; and vide 1 New R. 113.

So, a release was given by the plaintiffs to Ellerman, one of two partners, with a proviso that nothing therein contained should prejudice any claims of the plaintiffs against Forbes, the other partner, or against the joint estate of Forbes and Ellerman; and that it should be lawful for the plaintiffs, at any time, to prosecute any actions against Ellerman, jointly with F, or against E, separately, for the purpose of recovering their debt from Forbes and E, either out of the joint estate of F and E, or from Forbes or his estate separately. An action was brought by the plaintiffs against the two partners jointly, and Ellerman pleaded this release. The plaintiffs set it out on oyer, and replied that the action was brought against E, jointly with F, for the purpose of recovering the plaintiff's debt, either out of the joint estate of F and E, or from Forbes or his estate separately. To this replication the defendant demurred. But the court overruled the demurrer, and held that the release was no bar to the action; for it was to be construed according to the express intent of the parties, and in such a way as to give effect to the whole instrument; and the exception and proviso qualified the generality of the release.(a)

Solly v. Forbes, 2 Bro. & B. 38; 4 Moo. 448. β See Stewart v. Eden, 2 Caines, 121; Lessee of Roosevelt v. Stackhouse, 1 Cowen, 122; De Zeng v. Baily, 9 Wend. 336.*g* (a) If Ellerman, or his separate property, had been taken in execution contrary to the terms of the instrument, it seems he might have had a remedy by action, taking it as a covenant not to sue.

So where a deed, containing a general release of all debts, &c., recited that the releasee had previously *agreed to pay* to the releasor 40*l.*, for certain premises; and that in consideration of the said sum of 40*l.*, being now so paid as hereinbefore is mentioned, and also in consideration of 10*s.* a piece, well and truly paid to the said releasor and J S, the receipt of which said several sums of money they did thereby acknowledge, they did release, &c.; and there was a receipt for 40*l.*, endorsed on the release; but it appeared that, in fact, it had not been paid: it was held, that this deed of release was no estoppel from suing for the 40*l.*, since the general words of release were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the 40*l.*

Lampon v. Corke, 5 Barn. & A. 606; and see Baker v. Dewey, 1 Barn. & C. 704; Rowntree v. Jacob, 2 Taunt. 154. ||

β A recital in a deed of the payment of purchase-money and a receipt

(K) Where general Words of Release are restrained, &c.

endorsed for the same, are not conclusive evidence of payment nor a bar to a suit for such purchase-money.

Hamilton v. McGuire, 3 Serg. & R. 355; Weigly v. Weir, 7 Serg. & R. 309; O'Neal v. Lodge, 3 Harr. & M'Hen. 433; but see Mann v. Eckford's Ex., 15 Wend. 502.*g*

So, where the plaintiff released all demands on his own proper account, it was adjudged by the whole court, that an obligation taken by the plaintiff in his own name, in trust for the children of J S, was not discharged thereby.

2 Lev. 272, Stokes v. Stokes, Vent. 35; S. C. by the name of Nokes v. Stokes.

So, where in covenant to pay an heriot *post mortem* J S, or 40s. at the election of the plaintiff, the death of J S was set forth, and that afterwards the plaintiff chose to have the 40s., for which he brought his action, and assigned the breach in the non-payment; the defendant pleaded, that the plaintiff released to him all actions and demands, &c.; but this release was made in the lifetime of J S, and there was an exception in it of heriots; upon demurrer, it appearing that neither the heriot nor 40s. were in demand at the time of the release given, and it appearing plainly by the exception in the release not to be the intention of the parties to release the heriots, judgment was given for the plaintiff.

2 Mod. 281; 2 Lev. 210; Vent. 314, Trevil v. Ingram.

A recovered against B a judgment for 600*l.*, and made J S and J D his executors, and died; B made C his executor, and devised a legacy of 5*l.* to J D, and died; J D, by deed, acknowledged the receipt of the 5*l.* of C, and thereby released the said legacy, and all actions, suits, and demands which he had against C as executor to B, and after argument in B. R. it was adjudged that nothing was released but the 5*l.*

3 Mod. 277; 3 Lev. 269; Show. 150; Carth. 119, Cole v. Knight.

In *assumpsit* against the defendant for 7*l.* the plaintiff declares, that whereas he had mortgaged to the defendant certain copyhold lands, redeemable upon payment of such a sum of money, the defendant, in consideration that the plaintiff would release to the defendant his equity of redemption, assumed to pay to the plaintiff 7*l.* The plaintiff avers, that he did release his equity of redemption, but that the defendant has not paid the 7*l.* The defendant pleads this release in bar of the action, because, after the words *equity of redemption*, the scrivener had added, *and all actions, duties, and demands*; and on demurrer, the question in (a) C. B. was, whether this 7*l.* was released by those general words? and adjudged that it was not.

Ld. Raym. 235, Thorpe v. Thorpe. (a) Vide the arguments in this case in B. R. as reported. Salk. 171, pl. 3; Lutw. 245; Ld. Raym. 664. *β* Lessee of Roosevelt v. Stackhouse, 1 Cowen, 122; M'Intyre v. Williamson, 1 Edw. 34; Van Brunt v. Van Brunt, 3 Edw. 14; Rich v. Lord, 18 Pick. 322; Lyman v. Clark, 9 Mass. 235; Russell v. Coffin, 8 Pick. 143; Averill v. Lyman, 18 Pick. 346; Rice v. Woods, 21 Pick. 30; Wiggan v. Tudor, 23 Pick. 434.*g* {See 4 Bos. & Pul. 113, Butcher v. Butcher.}

If an obligation be dated and delivered the 23d of January, 5 Jac., and obligee make a release, which is dated 22d of January, 5 Jac., but delivered after 23d of January, and by this deed he releases to the obligor all actions *usque diem hujus presentis temporis*, this release shall not discharge the obligation; for *hujus presentis temporis* shall be taken the present time when the deed was dated. (b)

2 Roll. Abr. 410; vide Dyer, 56, 307; 2 Roll. R. 255; Palm. 218; 2 Brownl. 390. Cro. Eliz. 14; 2 Mod. 280. ||(b) Styles v. Wardle, 4 Barn. & C. 908, *acc.*||

(L) What Right or Interest shall be released, &c.

In trespass, assault and battery, the defendant pleaded a general release of all actions, &c., from the beginning of the world *usque ad diem datûs* of the said release; and it happened that the battery was done upon that very day in which the release is dated; so that it was held that this action was not discharged, for the release did not include that day, and the defendant should have traversed all, &c., after the date of the day of the release.

3 Mod. 182, *Dixon v. Terry*; ||*sed vide* Co. Lit. 46, b, n. 8; Cowp. 714.||

(L) What Right or Interest shall be said to be released; and herein, of Misrecitals and Exceptions in Releases.

A RELEASE of a bare right for a day or an hour, &c., is as good as if it was made to the other and his heirs.

Co. Lit. 274.

A release may be on condition, but a condition cannot be released on condition.

Co. Lit. 274.

But a release on condition that releasee shall pay releasor so much money, is not good; but if the release be worded in this manner, that if the releasee pay so much at a day to come, then he releases, &c., this is a good release.

Lutw. 638, *per Treby*, C. J. β See *Agnew v. Dorr*, 5 Whart. 131; *Tyson v. Dorr*, 6 Whart. 256.*g*

If one man finds the goods of another, and the owner releases to him who is in possession, this vests the property in him, (a) but such release must be by deed.

2 Roll. Abr. 407. (a) *Leon*. 283.

β If the owner of goods being trespass or trover and obtains a judgment equal to the value of the goods, the right of property is changed and vested in the defendant, although the judgment be not satisfied.

Marsh v. Pier, 4 Rawle, 285.*g*

If one makes a lease for ten years, remainder for twenty years, and he in the remainder releases to the first lessee, the releasee shall have thirty years for his term; for ten years shall not be drowned, because a chattel cannot be drowned in a chattel.

Co. Lit. 273.

The lord *paramount* cannot release to the tenant *paravaile*, saving to him part of the services, but the saving in that case is void. But if there be lord and tenant by fealty, and 20s. rent, the lord may release all his right in the seignory, saving fealty and 10s. rent; but the lord, upon his release to the tenant, cannot reserve a new kind of service.

Co. Lit. 305 b.

A release of common in one acre is an extinguishment of the whole common.

And 235; Show. 350.

An entire thing (b) cannot be released as to part; but if a man be bound to perform two things, the obligee may discharge the party of one of them.

3 Bulst. 232. (b) What shall be said an entire thing, *vide Palm*. 247; *Owen*, 21; *Moor*, 413.

A release of covenants shall release the bond for performance of cove-

(L) What Right or Interest shall be released, &c.

nants. So, in the case of *Hen v. Hanson*,^(a) it was agreed, that if the rent was released, the covenant for payment of it was released likewise.

Dyer, 356. (a) *Lev.* 99; *Sid.* 141.

If a man brings an appeal of *mayhem*, and after releases the action, the release shall bar him to have an action of battery of the same battery.

43 *Ass.* 39; 2 *Roll. Abr.* 413.

If a rent-charge issues out of three acres of land, and he who has the rent releases all his right in one acre, the rent is all extinct, because all issues out of every part, and it cannot be apportioned.

2 *Roll. Abr.* 414. || *Vide tit. Extinguishment*, vol. 4.||

β In Pennsylvania a release of part of the land, out of which a ground-rent issues, does not extinguish the whole rent, but merely apportions it.

Ingersoll v. Sergeant, 1 *Whart.* 337; and see *Cuthbert v. Kuhn*, 3 *Whart.* 357.^g

When execution is had of twenty acres, by a release of one acre, the execution is gone, and is a discharge of land and body.

And. 266; *Owen* 21; *Hetl.* 79.

A release of all advantages of account is a good bar to an action of debt upon that account.

8 *Co.* 152.

If I release to A all actions which J S has against him, the release to A is good, and the last words shall be rejected; (b) for a deed may be qualified and abridged by latter words, but not totally destroyed.

Dyer, 56, pl. 21. (b) If a release be limited as to one obligee, proviso that the other shall not take advantage of it, the proviso is void. *Lit. R.* 191.

A release to A and B of all actions, is a release of all several actions which the releasor has against them, as well as all joint actions.

Ld. Raym. 235.

A release excepting one bond, excepts suits and actions for that bond. *Cro. Eliz.* 726.

If A recite that he had recovered judgment against B before the justices in Derby, whereas in truth the judgment was had in B. R., this misrecital, it is said, will make the release void.

Dyer, 50, 87; and vide *Plow.* 191, 395; || *sed vide* 5 *Barn. & A.* 606.||

β A release without consideration, and not under seal, is void.

Lessee of Roosevelt v. Stackhouse, 1 *Cowen*, 122; *Crawford v. Millspaugh*, 13 *Johns.* 87; *Miller v. Hemler*, 5 *Watts & S.* 486; *Sigourney v. Sibley*, 21 *Pick.* 101.^g

The Profession have already been apprized by Mr. FEARNE, that the former collection in this Abridgment, under the title "REMAINDER," seems to be an extract from a Manuscript Treatise, apparently of the Lord Chief Baron GILBERT, upon that subject. In the following pages of this volume they will find the whole of that Treatise, which by the unsolicited kindness of Mr. HARGRAVE, was communicated to Sir HENRY GWILLIM, with a permission to print it at length. The parts of the Treatise which appeared in print for the first time in the last Edition, are distinguished by being included between inverted commas; the other parts are marked with a single inverted comma. The additional collections of the Compiler of the Abridgment are left without any distinguishing mark; the passages added by Sir HENRY GWILLIM are, as usual, inserted between crotchets; those for which the present Editor is responsible, are distinguished by the ordinary mark ||.

C. E. DODD.

REMAINDER AND REVERSION.

“ALL that it seems necessary to observe by way of introduction to the ensuing head, is, that after such time as the feudal property came to be extended and enlarged to a perpetual and durable estate, and that donations were frequently made to the feudary and his heirs, this gave him the absolute ownership and property in the feud, and, consequently, as absolute a power of disposing thereof to such persons, and upon such terms, as he thought fit; so that if he aliened the estate to any person for life or years, or any like interest, as the whole benefit he intended the person should be capable of, yet he left a reversion in himself, which being alienable, he might at the same time limit it to go over to any other person after the first interest determined. And this he might likewise limit and circumscribe as he thought fit, and make a further limitation over to any third person, and so on till he gave it out in as large a manner as he himself enjoyed it. All the limitations after the first were called ‘Remainders,’ either from their being a part of what remained and was left in the donor; or, from the nature and manner of their existence, as not being to come to the person intended, till after the preceding estates spent. But, because upon such donations made, the donors either reserved particular services to themselves, or in default of such reservation, the law created and raised to them certain duties and services to be done by the tenant, as a recompense and consideration for his enjoying the feud; therefore the tenant could in no case alien or dispose of the feud without a particular license of his lord for that purpose, since this would have been a breach of that trust the law had invested him with, and might have endangered the peace and security of the lord by subjecting him to the person of his greatest enemy. And as the tenant in such case had no power to alien without his lord’s license, so neither could he alien in such a manner as to leave his lord for any time, though never so small and inconsiderable, without a tenant to do his services, which the lord could in no sort be supposed to dispense with by his license. For, besides the danger that might possibly happen in that interval, the services being created at the same time with the feud, and coming to the lord in lieu thereof, were to be as perpetual and unalienable as the enjoyment of that was to be. And since the services to be performed were such as none who were uncertain of enjoying the feud during their lives would either undertake, or think themselves under a sufficient encouragement to perform as they ought, because, if they held the feud but for years, and should happen to survive those years, they would then become destitute of a provision and support for their lives, notwithstanding all their former labours and services to the lord; and, consequently, from such tenants the lord could not expect a faithful and zealous discharge of their duties: therefore the services were always to be performed by such as held the feud for life, at least; and, consequently, the tenant could not by his alienation leave the lord without such a one. For this reason it was, that if a lease was made for years, remainder to the right heirs of J S, there would be no tenant of the freehold to do the services. So, if a lease were made for life, or a gift in tail, to begin at a future day or time,

such lease or gift were made void ; for until the commencement, the lessee or donee would have nothing, and, consequently, be under no obligation to do the services ; and the lessor or donor in the mean time, having parted with their interest *pro tanto*, would be regardless of the services. To prevent, therefore, this inconvenience and danger to the lord, the law adjudged such lease, gift, or remainder to be void ; and, consequently, the first tenant continued tenant still to the lord, and as such was obliged to a performance of the services. These reasons, though they now seem antiquated, may perhaps be of equal force with the reason now commonly urged, from the danger of suffering the freehold to be at any time in abeyance, expectancy, or suspense, because the rights of strangers would suffer thereby, for want of a person in the meantime to charge with a præcipe for recovery thereof. But yet it was not absolutely necessary, that the estate of freehold or inheritance should be the present and only subsisting interest : for if a lease were made for years, remainder for life, or in tail, and livery thereupon, this remainder was good ; for here was no time wherein the lord was without a tenant of the freehold, and his being obliged to all the feudal services might perhaps be one reason why so little regard was had to the interest of the lessee for years, he being no ways able to control or impeach the acts or disposition of the freeholder.

Cowell, and Terms of the Law, tit. *Remainder*. Co. Lit. 49 a, 143 a, 26, 51 ; Moor, 344 ; Vaugh. 269 ; Co. Lit. 43 a, b ; 2 Inst. 65, 66, 501 ; 9 Co. 135 ; Co. Lit. 269 a, b ; 6 Co. 57, 58.

“ Another thing observable is, that as the tenant could in no sort alien without his lord's license, nor could that license be so interpreted as to deprive the lord of a tenant qualified to do his services, so, when he had, by a sufficient provision, taken care of his lord, he might then carry over the disposition to any other person as far as he pleased. For it would have been unreasonable to compel him to assign over the whole fee to any other person, when no exigencies of the tenure required it, and would also have taken away his power of providing for others, whom he might lie under equal obligations to take care of. Hence came the notion of remainders ; and the reason why they were to be limited and pass out of the grantor at the same time with the particular estate, seems to arise from the nature of the license formerly given for alienation. For as the tenant could not alien at all without his lord's license, so neither could he alien for any longer time, or to any other person, than such license warranted. Therefore, if he had a mind to dispose of the feud to several persons in succession, he was to procure a license for that purpose, and by proper limitations to let in all persons within the benefit of it at the same time, lest by death or otherwise he might be afterwards prevented from pursuing it. And these remainders are now limited of such sorts of inheritance as will not come within the rules of this reasoning. And though licenses for alienation are ceased, yet it has been thought fit to observe the rules deducible therefrom in the limiting and settling of such remainders. But, before we enter into a particular division of this head, it will be necessary to observe further, that anciently the tenant being possessed of the entire property of the feud, might, upon his alienation in fee, have erected a seignory to himself, to arise out of the tenancy. And this practice was encouraged, because it multiplied feudal tenants, and brought greater force into the field. But, though these seignories were so far in the nature of reversions, that upon determination of the tenancy in fee by escheat or forfeiture, the

tenancy came back again to the first tenant, and he became seised thereof in fee as he was before ; and though the seignories themselves were then alienable, as the reversion now is, and carried with them the rents and services, as a grant of the reversion now does ; yet, whether they might have then limited a remainder over upon a tenancy in fee, as they may now do, where the reversion would otherwise vest in themselves, is uncertain, since there was no reason of convenience to multiply such remainders, though they found it convenient to multiply such seignories. But, however it happened before the statute of *quia emptores*, yet after that statute no one could have disposed of the fee without a remainder upon it. For the fee in all cases by that statute was to be holden of the first feudal lord ; and, consequently, the tenant, who made the alienation, had nothing further to expect in the tenancy, either as a seignory, reversion, or escheat ; but these now belonged to the first feudal lord, and therefore the tenant could not dispose of what belonged to another : for the reason of making that statute was, that the tenant might not erect seignories to himself to prevent the escheat to his lord : hence it plainly followed, that every remainder must depend upon a particular and less interest than the fee, and therefore was confined to three cases, viz. : to estates for years, which is the least certain interest the law knows, to estates for life, and to estates-tail. The estates for years and for life were the ancient one at common law, and were the terms for which people usually disposed of the feudal interest : the estate-tail came in upon the construction of the statute *de donis*, which made the inheritance to be certainly descendible. And when the statute *quia emptores* followed it so near, they then construed the fee conditional in the donee to be an estate-tail, and the ancient seignory in the donor to be a reversion. If they had not made such construction, the statute of *quia emptores* had shut out the donor, which had been to carry the matter farther than either statute intended ; and therefore, to preserve the force of both statutes, that which was before called a seignory was now called a reversion, that the donor might have his own interest preserved, and yet not be said to erect an intermediate seignory between him and his lord, which the statute of *quia emptores* had forbidden. And all this plainly shows, that a seignory and a reversion are in their own nature much the same."

1 West. pl. 567 ; Co. Lit. 22, 23 a ; 2 Inst. 335.

"But, for the better understanding of this head, we shall consider,

- (A) Of what Things a Remainder may be made.
- (B) What Words are sufficient to create a Remainder.
 - 1. *Of the Propriety of the Words made use of to pass the Remainder.*
 - 2. *Of the Description or Designation of the Person who is to take the Remainder.*
- (C) Of the several Kinds of Remainders as distinguished into Remainders vested, or in Contingency or Abeyance.
- (D) Of Remainders in Abeyance or Contingency ; what Estate is sufficient to support them ; where they are to take Effect ; and by what Means they may be destroyed or prevented from coming *in esse* ; and therein, of Remainders by way of executory Devise or future Interest.
- (E) Of Remainders that arise on Conditions Precedent or Subsequent.
 - 1. *Of the Difference between a Condition and a Limitation, and in case of the Condition when it precedes the vesting of the Remainder as the Cause thereof, and is*

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(A) Of what Things a Remainder may be made.

annexed to the first Estate, and when it is annexed to the first Estate absolutely without any regard to the Remainder.

2. *Between a Deed and a Will, when in both the same Words of Condition are made use of for vesting the Remainder.*
3. *Between a limitation over in such Case of a Will, and where no Limitation is made over.*
4. *Between Remainders that are to arise upon Conditions agreeably to the Rules of Law, and such as are to arise upon Conditions repugnant and against the Rules of the Law.*
5. *Between such Words as actually make a Condition, and such as are only descriptive of the Manner when and how the Remainders are to arise and take place.*

(F) Of Cross Remainders, or those arising by Implication and Construction of Law.

(G) Of vested Remainders, and of the particular Estate to support them in their Creation; how long it must continue; and when by Determination, Grant, or Refusal thereof, the Remainder is discontinued, barred, or destroyed, and when not.

(H) In what Cases a Remainder or Reversion shall be subject to the Acts or Charges of the particular Tenant; and therein, of the Remedies for him in the Reversion or Remainder by Entry, Action, or Receipt.

(I) To what Purposes the Remainder is accounted but as one with the particular Estate, and where they are regarded as several Estates.

(A) Of what Things a Remainder may be made.

“ALL that it seems necessary to observe for explaining and clearing this point will be resolved by putting a case or two, wherein it has been holden doubtful if the remainder were good.

“A man seised of lands in fee grants thereout a rent-charge to one for life or years, remainder over to another in fee or in tail, &c. It was doubted whether this remainder were good, because this rent had no existence at all before the grant; and the grantor cannot be said to have any part of the rent left in him, as he would of land, because he first gave being to the rent, and bounded the time of its existence, which being run out, nothing thereof remains to grant over to another; and a remainder is to be granted out of that which would otherwise be a reversion in the grantor, which here this rent cannot be, being newly created. But in this case, by the better opinion of the books, and a judgment lately in point, (a) such remainder of a rent newly created has been holden good. For, as the grantor might at first have granted it in fee or for ever, having such perpetual and durable interest in the fund out of which it was to arise, so he may share and divide the grant, and give part thereof to one, and part to another in succession; and the rather, because the particular estate and remainders are but as one estate, as to the grantor, being limited to pass out of him all at the same time. And as to him, it makes no difference, whether one or more take benefit jointly, or in succession one after another. But, (b) if he grant such rent for life or years, without going further, he cannot after grant the reversion thereof to another, because he has no reversion in him for the reasons before given. The reason of this case will go likewise to commons, estovers, &c., newly created.

Plowd. 35 a; 1 Brook, 252, pl. 8, 254, pl. 54, 58; 2 Roll. Abr. 415, pl. 2, 26, 70, 76, 78. (a) 1 Lev. 144; 1 Sid. 285; 2 Keb. 29. (b) Mo. pl. 100.”

In the case of *The King v. Kemp*, it was held, that the king may grant
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an estate in an office to commence *in futuro*, or upon a contingency ; for he hath no inheritance in the office, or the execution of it, but in point of interest only to grant. And it was said, there was a diversity between offices in fee existing, and such as were granted only for life, which being as a new thing created, might, as a rent *de novo*, be granted to commence *in futuro*.

4 Mod. 275, 280 ; Ld. Raym. 49 ; Skin. 446, pl. 4. See 2 Salk. 465, pl. 2 ; Carth. 252, 350 ; 2 Salk. 465, pl. 2 ; Comb. 334, Rex v. Kemp.

‘ If one be created baron, viscount, earl, &c., by patent, and after, in the same patent, the same honour be granted to another in remainder, yet this operates as a new grant, and not as a remainder ; for the king had no reversion of that honour in him, though he had still the same power of appointing one in succession to take it, as he had of granting it to the first.

Show. P. C. 5, 11.

‘ So, if one hath the office of park-keeper, forester, jailer, sheriff, &c., to him and his heirs, he may grant these offices to one for life, remainder to another for life, &c. ; for *omne majus continet in se minus*, and as they are grantable over in fee, so may they be granted in succession to one for life, with remainders over, &c.

9 Co. 48 ; And. pl. 201.’

A license to sell wine may be granted to one for life, remainder to another for life ; because by such license not only an authority passeth, but an interest, by way of restitution to that which was the subject’s right before he was prohibited by statute.

Lev. 220 ; Bridg. R. 113.

“ But before we leave this head, it may be proper to inquire into the reasons and practice of limiting remainders in personal goods or chattels ; for these in their own nature seem incapable of such a limitation, because, being things transitory and by many accidents liable to be lost, destroyed, or otherwise impaired : besides, the exigencies of trade and commerce requiring a frequent circulation thereof, it would put a stop to all trading, and occasion perpetual suits and quarrels, if such limitations were generally tolerated and allowed. But yet, in last wills and testaments, such limitations over of personal goods or chattels have sometimes prevailed ; especially, where the first devisee had only the use or occupation thereof devised to him ; for then it was holden, that the property continued in the executors of the testator, and that the first devisee had no power to alter or take it from them. But in either case, if the first devisee did actually give, grant, or sell such personal goods or chattels, the judges would very rarely allow of actions to be brought by those in remainder for the recovery thereof. Hence it came to pass, that it was a long while before the judges of the common law could be prevailed with to have any regard for a devise over even of a chattel real or a term for years, after an estate for life limited therein, because the estate for life being in the eye of the law of greater regard and consideration than an estate for years, they thought, he who had it devised to him for life, had therein included all that the deviser had a power to dispose of. And though they have now gained that point upon the ancient common law, by establishing such remainders, and have thereby brought that branch out of the Chancery, (which court frequently helped the remainder-man by allowing bills to compel the first devisee to give

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security, &c.,) yet it was at first introduced into the common law under a new name, and took all the sanction it has since received from thence; an account whereof, and how far it has been carried, may be seen at large in the Duke of Norfolk's case. But, as to personal goods and chattels, the common law has provided no sufficient remedy for the devisee in remainder of them, either during the life of the first devisee, or after his death; therefore the Court of Chancery seem to have taken that branch to themselves, in lieu of the other which they lost, and to allow of the same remedy for such devisee in remainder of personal goods and chattels, as they before did to the devisee in remainder of chattels real or terms for years.

37 H. 6, 30 a; Dyer, 7, pl. 8, 359, pl. 52; Cro. Car. 347; Plowd. 521 b, 542 b; Br. tit. *Devise*, pl. 13; 5 Co. 16, 17; 1 Roll. Abr. 6, 10, pl. 4; Godolph. Abr. 356; Swinb. 137; 1 Bulstr. 192; 8 Co. 95; 2 Bendl. pl. 57. ||As to the limitation of chattels, see Roper on Legacies, c. 22, (3d ed.)|| {Vide 2 Day, 28, Griggs v. Dodge, Ibid. 52, Taber v. Packwood;} 3 Ch. Ca. 1.

"Therefore, where a man devised 600*l.* a piece to two daughters, and the residue of his personal estate to his son, and if either of his children died during their minority, the survivors to be heirs to the deceased by equal portions; the son died, and the one sister brought a bill against the executors and the other sister to have her own 600*l.* and the half of her brother's personal estate; she had a decree accordingly; but was forced to give security to pay back her own 600*l.* in case she died during her minority; though it was said, if she died during minority leaving issue, it would be a hard case.

1 Ch. Ca. 199.

"A devise was made of the use of goods, plate, and household stuff to one for eleven years, and after to another, and held a good devise, and a decree to deliver them accordingly after the eleven years.

2 Ch. R. 137, Jolly v. Wills.

"So, upon a devise of the use of certain books, jewels, and rarities, to one for life, and after of the things themselves to another; he in the remainder brought a bill in the lifetime of the first devisees to have security for their forthcoming after the death of the first devisees; and the court, being assisted by two judges, held the remainder good; but ordered them to move for the security another time.

1 Ch. Ca. 130, Vauchell v. Lemon;" {Prec. Ch. 71, Cooper v. Williams; 2 Johns. Rep. 346, Dewit v. Schoonmaker;} ||See Fearné, C. R. 404, (7th ed.)||

A farmer devised his stock, (which consisted of corn, hay, cattle, &c.,) to his wife for life, and after her death to the plaintiff. It was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them: but the Master of the Rolls said, the devise over was good, but added, that if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of the sale. And an account was decreed to be taken accordingly.

Abr. Eq. 361, Hale v. Burrodale. [Where the things limited over are of a perishable nature, the modern way, I believe, is to direct them to be sold, and to allow the tenant for life the interest of the produce of the sale.] {On this subject see 3 Ves. J. 314, Porter v. Tournay; 7 Ves. J. 89, Gibson v. Bott; Ibid. 137, Howe v. Earl of Dartmouth; 9 Ves. J. 549, Fearn v. Young. If bank stock is bequeathed for life, remainder over, and the bank makes an extraordinary dividend beyond the usual divi-

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dend, the court of chancery, in England, considers it as capital, and that the tenant for life is not entitled to the absolute property, but only to the interest of it; and this whether the extraordinary dividend is made in stock or money. 4 Ves. J. 800, Brander v. Brander; 10 Ves. J. 185, Paris v. Paris; Ibid. 288, Clayton v. Gresham. }

A gives his sister by will 10*l*., and directs that such part of his personal estate as his wife should leave of her subsistence should go to the sister: whatever the wife has not employed in that way shall go over and be accounted for.

1 P. Wms. 651, Upwell v. Halsey.

“But, where a man devised debts and personal estates to one, whom he intended executrix, for life, and after her death to another; the executrix died, and he in remainder brought a bill against her executor for the said personal estate; the bill was dismissed, and the remainder holden void, the first devisee being executrix, in whom the personal estate vested and attached by a right prior to the devise, and so belonged to her executor.

2 Ch. R. 151; Warner v. Boosley, Swinb. 137; God. Abr. 360; Manning's case, 8 Co. 94, *contra*. There, the devise is to the executrix for life, remainder over, and the executory devise adjudged good.” || See 1 Chanc. Ca. 129; 2 Freem. 137; Cas. 172; 1 P. Will. 6; 2 Freem. 206; Cas. 280; 5 Mad. 277; Fearne, C. R. 404, (7th ed.) || The will of B G contained the following clause, “Also I give to my wife, E G, all my personal estate whatsoever and wheresoever, and of what nature, quality, and kind soever, after payment of my debts, legacies, and funeral expenses; which personal estate, I give and bequeath to my said wife, E G, to and for her own use and disposal absolutely; the remainder after her decease to be for the use of the said J G,” (the son of the testator,) and appointed his wife, E G, sole executrix. Held, that J G took a vested remainder in the personal estate which came into possession after the death of E G. Smith v. Bell, 6 Peters, 68.*g*

A being possessed of a term for ninety-nine years, devises it to B for life, and after to six others successively, for their lives, if the said term should so long continue; and all the seven persons being dead, and the term continuing, it was adjudged, that it should revert to the executors of the testator, and that it did not vest in the survivor of the devisees so as to transmit it to his representatives.

Salk. 231, pl. 9; Ld. Raym. 325, Ayres v. Falkland. See Pollex. 32.

But a devise of a term for years, or personal chattel to one for a day or an hour, is a devise of the whole term or interest, if the limitation over is void, and it appears at the same time that the whole was intended to be disposed of from the executors.

1 P. Wms. 666. Vide Executory Devises, under tit. “*Legacies and Devises*,” vol. vi. || Mr. Fearne and Mr. Butler lay it down that a remainder, in the legal sense of the word, cannot be limited in chattels real or personal, after a disposition of them to one for life, or otherwise. See Fearne, C. R. (7th ed.) p. 401; but that such limitation is only good as an executory devise. See the observations on this point in Cornish's Essay on Remaind. p. 92; and that terms of years may clearly be limited over by way of remainder, after a previous disposition of a partial interest in the term, see Goodright v. Parker, 1 Maule & S. 692; Cotton v. Heath, 1 Roll. Abr. 612, pl. 3; 1 Eq. Abr. 191, pl. 2; Preston on Abs. vol. 2, p. 4; Fearne, C. R. 402. || See Scott v. Price, 2 Serg. & R. 59; Diehl v. King, 6 Serg. & R. 31; Milfin v. Neal, Ibid. 460; Smith v. Bell, 6 Peters, 68; Patterson v. Ellis, 11 Wend. 260.*g*

“Where money, goods, or other personal chattels, are devised to one and the heirs of his body, or to one, and if he die, without heirs of his body, the remainder over, this remainder is totally void, and the courts will not allow of a bill by the remainder-man to compel security to have the money, &c., after the death of the first devisee; but it shall go to his executors or administrators. For the first devise gives the absolute pro-

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perty of personal estate, as a like devise of real estate before the statute *de donis* gave a fee, upon which no limitation could be made further; and as the heirs are the representatives to take a real estate, so are the executors to take a personal estate; and this is not within the statute *de donis*, but remains at common law.

1 Ch. R. 129, 260; 2 Ch. R. 66, 153; 2 Ch. Ca. 94; 2 Vent. 349."

If A devise that his goods and furniture shall remain in his house to be enjoyed according to the limitations of his will, by those entitled to the house, the first that would be tenant in tail of the house becomes absolute owner of the goods.

Saunders v. Saunders, admitted. [See Gregory v. Pelham, 5 Br. P. C. 435; Duke of Bridgewater v. Egerton, 2 Ves. 122; 1 Br. Ch. R. 281, notes; Duke of Marlborough v. Spencer, 1 Br. P. C. 592; Foley v. Burnell, 1 Br. Ch. R. 274; Dom. Proc. 27 April, 1785; || Cowp. R. 435, note; || Vaughan v. Burslem, 3 Br. Ch. R. 101;] {3 Ves. J. 387, The Duke of Newcastle v. The Countess of Lincoln; 12 Ves. J. 218, S. C., on appeal; 11 Ves. J. 280; } || Lincoln v. Duke of Newcastle, 12 Ves. 218, 230; Carr v. Erroll, 14 Ves. 478; Deehurst v. Duke of St. Albans, 5 Mad. 232. || See Woodruff v. Wilson, 2 Ashmead, 278.g

"But where a devise was of money and goods to one for life, and if the devisee died without issue, then to go over to another, this was held a good devise over; for the first limitation being expressly for life, the words after could not enlarge it by implication, as they would a real estate, and then it falls within the common rule of other cases.

2 Ch. R.

"One by will devised 1300*l.* to his daughter A, to be paid at her age of 21 years, and if she died without issue before 21, then to go over to B, provided if she married before 21 without consent of certain persons, then to go over to C. She did marry before 21 without such consent; and upon a bill brought by B it was decreed, that A should give security, &c., for the money, if she died before 21 without issue; and the Master of the Rolls who heard the cause said, the law was now settled accordingly. But there, the decree was so ordered as to serve both contingencies, viz., that upon her marriage before 21 without consent, the money should go to C, yet so that if she died before 21 without issue, it should go to B according to the devise.

Pawlett v. Doggert, MSS. Gilb; " || 2 Vern. 86, S. C. ||

§ Where a legacy is given when the legatee attains the age of twenty-one years, if the deviser directs the interest to be applied in the mean time to the benefit of the legatee, this being an absolute gift of the interest, the principal will be deemed to have vested.

Patterson v. Ellis, 11 Wend. 260.

So if it be left to the discretion of a trustee to pay it sooner than the time specified in the will.

11 Wend. 260.

Chattels or money may be limited over after a life-interest, but not after a gift of the absolute property.

11 Wend. 260.

A remainder over of personal property may be created by will.

Griggs v. Dodge, 2 Day, 28; Taber v. Packwood, 2 Day, 52.

A remainder may be limited after a life-estate in personal property.

Smith v. Bell, 6 Peters, 68. See Legacies, B. 2, vol. vi. p. 198. Before delivering

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the article bequeathed, the executor may require security for its return from the legates for life. *King v. Diehl*, 9 Serg. 409; *Covenhoven v. Shuler*, 2 Paige, 123; but see *Lippincott v. Warder*, 14 Serg. & R. 118; *Lessee of Hotchkiss v. Wight*, 3 Wend. 109; *Kinnard v. Kinnard*, 5 Watts, 109; case of *Brinton's estate*, 7 Watts, 203. By statutory provision, it is provided in Pennsylvania that when personal property is bequeathed for a limited period, or upon condition or contingency, that the executor shall not be compelled to pay or deliver the property until security be given in the manner prescribed to secure the rights of the person in remainder. Act of 24th February, 1834, § 49.g

(B) What Words are sufficient to create a Remainder.

1. *Of the Propriety of the Words made use of to pass the Remainder.*

‘THE word *Remainder* is no term of art, nor is it necessary to create a remainder. For any other words, sufficient to show the intent of the party, will create a remainder; because such estates take their denomination of remainders more from the nature and manner of their existence, after they are limited, than from any previous quality inherent in the word *remainder* to make them such. Therefore, if a man gives lands to A for life, and that after his death the land shall revert and descend to B for life, &c., this is a good remainder, and may be pleaded as such.

Roll. Abr. 416; 1 Brook, 253; Plow. 29, 134, 157 b, 159, 170 b, 542 a; Dy. 125 b; 1 Roll. R. 319. β Executory devisees are to be excluded if the estate can pass as a remainder. *Hawley v. Northampton*, 8 Mass. 3.g

‘So, if lands be given to one and the heirs male of his body, and to him and the heirs female of his body, this limitation to the heirs female is a remainder; because it is not to take place till the estate to the heirs male is spent.

Co. Lit. 377 a.

‘So, if lands are given to a widow, and to the heirs of the body of her late husband on her begotten, this is a remainder to the heirs of the body of the husband; because it cannot take effect till after the widow's death, who hath an estate for life.

Co. Lit. 26 b; 220 a; 2 Mod. 210. β A devised lands to his wife for life, and after her death to his son B, his heirs and assigns for ever; B took a vested estate in remainder on the death of A, which in case of his dying in the lifetime of the mother would go to his heirs, if not otherwise disposed of by him. *Wimple v. Fenda*, 2 Johns. 288.g

‘So, an estate limited to A for life, or in tail, *et post decessum ejus*, or *pro defectu talis exitus*, to B and the heirs of his body is good, though there be not the word *remainder*. So, if a lease be made to A for life, and that after his death B shall have the profit, this is a good remainder to B.’ “And in the common limitations of settlements at this day, the word *remainder* is seldom used.”

‘Plow. 159; Moor, pl. 54; Dyer, 125; Roll. R. 319; Cro. Eliz. 10, 742.’

‘So, a lease to A for life and that after his death his children shall have it, is a good remainder.

6 Co. 17 b; Raym. 83.

‘Nay, though an estate be limited expressly as a remainder, yet, if it be not so in construction of law, the word *remainder* will have no force to make it such. As, where A was seised of lands in fee, and he and B levied a fine to C in fee, who granted and rendered to B in tail, rendering rent, and if B died without issue, *tenementa pred. integrè remanerent* to A and his heirs; B suffered a common recovery; and A distrained for his rent: this was adjudged a reversion, and as such the rent passed with it

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to A, and was chargeable upon the land in whose hands soever it came, by virtue of a contract which cannot be destroyed by the recovery.

Cro. Eliz. 727, 768, 792; Moor, pl. 795; Co. Lit. 299; Raym. 142.

‘But here it may be proper to take notice of a set of words sometimes used in leases for years, which are so far apart of the limitation and description of the first interest, that they cannot again be made use of to pass any further interest in the same land. As, if one make a lease to A for eighty years, if he so long live, and if he happen to die within the said term, *then the lands for the residue of the said term, or for so many years as shall be then remaining of the said term, to go over to another*; this limitation over is void; because the time, or term, of eighty years was not absolute to A, but was determinable upon his death, and by his death the whole term is at an end; as if a lease had been made to him barely for his life, and then to limit the residue of a term, when nothing thereof remains, is repugnant and void. But some opinions incline, that a devise in such a manner would be good, by reason of the intent of the party and the equivocal signification of the word *terminus*, which may, though not strictly, signify also the time or space of eighty years, as well as the estate or interest for eighty years, determinable as aforesaid. But now, if a lease be made to A for eighty years, if he so long live, and if he die within the said term, *then the land to go over to another for the residue of the eighty years*, this is a good remainder; because, though the term or interest be determined, yet the land, and part of the years, still remaining, those years may be made the measure of the succeeding interest, as any other number of years may be.

Cro. Eliz. 216; Leon. 218; Co. 153; Dy. 253; 3 Leon. 195; Swinb. 123; God. Abr. 356; 2 Roll. Abr. 415; 1 Bulstr. 193; Bro. 321; Co. Lit. 45; Plow. 198; Moor, pl. 441; Mod. 195, 520; *contr.* vide 1 Leon. 195; 1 And. 259.’

J S seised of lands in fee by indenture demise them to A for life, *habendum* to the said A, B, C, and D, his three sons, for their lives and the life of the survivor of them successively; after the death of A it was adjudged in this case, first, that if the sons could take, it must be by way of remainder, they not being parties to the deed, and then it must be as joint-tenants, which could not be by reason of the word *successivè*. Secondly, that they could not take in succession, for the (a) uncertainty whose estate or interest was to commence first.

Hob. 313; Hutt. 87, *Windsore v. Hobart*. (a) But had it been ascertained by a clause *successivè sicut nominantur in charta*, it had been good. Leon. 246; Godb. 220.

β Testator devised as follows, namely: “I give to my wife E all the personal estate whatsoever and wheresoever, and what nature, quality or kind soever, after paying my debts, legacies and funeral expenses; which personal estate I give and bequeath to my wife E, to and for her own use and benefit and disposal absolutely. The remainder of said estate, after her decease, to be for the use of Jesse Goodwin.” Held, that the absolute interest in the property, and the power of unlimited disposal, was given by the first bequest to the wife, and the remainder over to the son was repugnant to the estate first given, and void.

Smith v. Bell, Mart. & Yerg. 302.

A, by deed, “lent his sister B a negro slave and her increase, during her natural life, and, at her death, gave the slave and her increase unto the heirs of his said sister, lawfully begotten of her body for ever.” Held, that the slave vested absolutely in B, it being a rule with respect to chattels that where a remainder is limited by such words, which, if applied to

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realty, would constitute an estate tail, the person to whom it is given takes the property absolutely.

Nichols v. Cartwright, 2 Murph. 137.

A life-estate may be reserved, and a valid remainder in slaves may be created by deed.

Johnson v. Mitchell, 1 Humphr. 168.

A testator devises all his estate, real and personal, to his daughter for ever, when she attains the age of twenty-one years, or the day of her marriage, whichever shall first happen; if she dies before then he devises over: she died unmarried at the age of eighteen years. Held, that the contingency was annexed to the estate and not vested, and that the intermediate profits went to the devisee over.

Mackey v. Alston, 2 Desaus. 362.

When a limitation over can be supported as a contingent remainder, it will never be construed as an executory devise.

Veder v. Everton, 3 Paige, 281. See the following cases as to the difference between contingent remainders and executory devises. Gardner v. Lyddon, 3 Yo. & Jer. 389; Genery v. Fitzgerald, Jac. R. 468.

A devise of real estate to testator's daughters, but if all the deviser's children should die leaving no lawful issue, then limited over to others: the limitation is good.

Reynolds v. Calder's executors, 1 Desaus. 356.g

2. *Of the Description or Designation of the Person who is to take the Remainder.*

"As to the description or designation of the person who is to take the remainder, so far as it falls within the names of purchase allowed of by law, I shall not here enter into it, that being equally applicable to possessions as well as remainders. All that seems here proper to come under consideration is, how far a limitation in remainder to a man's own right heirs, or the heirs male or female of his own body, or to the right heirs of another person, shall be good as a remainder, and how far not. As to the limitation to a man's own right heirs, or the heirs male or female of his own body, this is void, because, say the books, no one can make his own right heir a purchaser either of a fee-simple or a fee-tail, without departing with the whole estate. But this being a reason that carries little satisfaction or instruction with it, we must therefore seek higher, and endeavour to fetch the reason of it from the old constitution whereon all our law seems to be founded, that is, from the nature of the feudal tenure, and the relation that was at first established betwixt the lord and his tenant. And then clearly the reason seems to be this: when donations came to be made to the feudary and his heirs, or heirs male, or heirs female of his body, under certain duties and services, these words, 'heirs, &c.' being words of limitation, and appropriated to measure out the length or continuance of the estate intended to be given, and of the present tenant only, the lord could have notice how far he would be capable of performing the services, but not of the heirs, or heirs male or female, &c., who were not then *in esse*, and yet were to be liable to the same services, when they came into the tenancy: therefore the lord was to have the tuition and education of such heirs, &c., in case they happened by reason of their minority to be incapable of performing the services, that so he might, by his care and discipline, secure to himself tenants always capable thereof, either in their own persons, if they happened to be males, or by proper marriages with

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his tenants, if they prove to be females. And this was the more reasonable, because he gave the tenancy to the heirs, or heirs male, or heirs female, &c., as well as to the tenant himself; and all who came under that description were equally in his view, and within the words of his gift. But now, if the tenant might have broken through this provision of his lord, and have given the tenancy to his heirs, &c., by his own immediate gift, then all these ends of the tenure had been frustrated and defeated; for they coming to the tenancy, not by the donation of the lord, but by the disposition of the tenant, though they would have been still liable to the naked services, yet the lord had lost the advantages of wardship, marriages, &c., which were annexed only to those who came in upon the terms of his own donation by descent; and since they, as heirs, were equally included in the first donation, and upon the death of their ancestor were to come in, in virtue thereof; therefore the law construes such gift or disposition of the tenant, whether in possession or remainder, to be totally void; either for that then it came too late, the tenancy being vested in them immediately upon their ancestor's death, and therefore it was fruitless to give them what they had already; or to prevent the mischiefs that might accrue to the lord by settling in such tenants, as for the present might not be capable of doing the services, and for want of a proper education under the lord, would never after be qualified for them. And this seems to be the true reason of that so often *decantatum* in our books, that a man cannot make his own right heir, or heir male, or female, a purchaser, without departing with the whole fee. And therefore when the tenants found that this would not do to defeat the lord of the wardship and marriage of their heirs, they then found out the way of making feoffments and other dispositions to their eldest son apparent by name in their lifetime; and then, though they died leaving him a minor, and not capable of the services, yet the lord lost the advantages of wardship, marriage, &c. But to meet with this device, and others of the like kind, the statute of Marl. c. 6, and other subsequent statutes were made, which have secured the lords against all the evasions of their tenants to defeat them of the advantages of their seignory.

Co. Lit. 22; 2 Inst. 109, 110, &c.; Co. Lit. 76, 78; 6 Co. 78; Plowd. 82 a."

'Therefore, if a man makes a lease for life, or a gift in tale by deed, remainder to another for life or in tail, remainder to himself and his heirs, or to his own right heirs only, this remainder to himself or to his heirs is void, because the fee continued still in him; and then he cannot give himself what he had before, and he cannot give to his heirs as such what the law gives them by a prior right to vest at the same time with his disposition to them.

Dyer, pl. 20; Moor, 720.'

So that if one levies a fine to the use of his wife for life, the remainder to the use of his eldest son, and the heirs male of his body; and for want of such issue, to the use of his own right heir, this limitation to the use of his right heir is merely void, and he hath a reversion and not a remainder in him.

Leon. 182; Moor, 284; And. 288; Fenwick v. Mitford. ||Vide Co. Lit. 22 b note 3; Fearn, C. R. 42, 43, 51.||

"So, where A by indenture gave lands to B for life, remainder to the heirs male of the body of A, remainder to his own right heirs; A died,

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leaving two sons; the eldest had issue a daughter, and died; it was adjudged for the daughter against the uncle; either because the estate to the heirs male was void, the fee being cast upon him by the death of the ancestor, in virtue of the first donation; or, because, admitting it to be good, then it was vested in the eldest son by purchase, being the first taker, and consequently ceased upon his dying without issue male, and then the daughter is heir of the fee-simple.”(a) ‘But, if a man makes a feoffment in fee to the use of himself for life, remainder to the heirs male of his own body, this is a good estate-tail executed in himself, for the law conjoins his estate for life, and the remainder to the heirs male of his body, to prevent that remainder’s being lost by forfeiture or determination of the particular estate before it can vest, and the limitation is good by way of use, because it is (b) raised out of the estate of the feoffees, as if they had given it to him in such manner.’

“Dy. 156, Graswold’s case; Hob. 30; 2 Roll. Abr. 415, pl. 1; Co. Lit. 22 b; Bendl. 40; 2 Leon. 25; 2 Mod. 209; 1 Ventr. 378; 1 Roll. R. 239; *contra per Co. arguendo*. Co. Lit. 22; Bendl. 49; Hob. 30.” ||(a) *Sed vide* Harg. Co. Lit. 14 a, n. 6; and Fearn, C. R. 80, 81, (7th ed.,) (Butler,) from which it should seem that the youngest son would take after his brother in this case as heir male of the body of A, notwithstanding the eldest son took by purchase; for, according to Ld. Hale, it is a *quasi entail*; so that the second reason assigned for the judgment does not seem satisfactory. || (b) So, if one covenants to stand seised to the use of his heirs male on the body of his second wife, he takes an estate for life by implication, and so it is an estate-tail executed in himself. *Pybus v. Mitford*, Vent. 372; 2 Lev. 75; Raym. 228; Mod. 98, 122, 159; 3 Keb. 229, S. C. adjudged.’ [In a subsequent case, where the use was limited to the grantor himself for ninety-nine years, remainder to the use of the trustees for twenty-five years, remainder to (the use of) *the heirs male of his own body*, remainder to his own right heirs; the court held the limitation to the *heirs male* of the body to be void, because there was no preceding freehold limited to support it, and that it should not be implied *contrary to the intent* of the conveyance; that there the estate took effect by transmutation of possession out of the seisin of the trustees, and not like *Fenwick* (should be *Pybus*) and *Mitford*’s case, where the owner *covenanted to stand seised* to the use of the heirs of his body. And *Powell, J.*, held, that even in that case, if there had been an *express estate limited to the covenantor*, it had been different. *Adams v. Savage*, 2 Salk. 679; 2 Ld. Raym. 854; 6 Mod. 134, S. C. So, where A by marriage settlement conveyed certain lands to the use of himself for ninety-nine years, if he so long lived, and after to the use of trustees for 200 years, remainder to the use of *the heirs male of his own body*, remainder to his own right heirs; upon a case referred to the judges of C. B. from the Court of Chancery, they held the limitation to the heirs male of the body of A void, no freehold being limited to any person precedent to that estate; and that no estate of freehold could *result to A* for his life *by implication*; because another estate, viz., for ninety-nine years, if, &c., was expressly limited to him, which would be inconsistent with a freehold by implication. *Rawley v. Holland*, Vin. Abr. tit. “Uses,” F. pl. 11.] ||See *Fearn*, C. R. 42—44, (7th edit.)]

β A testator devised several tracts of land to his sons A, B, and C, chargeable with certain payments, “to be held and enjoyed by each respective son, his heirs and assigns for ever,” and added, “but if either of my sons die having no child or children, then after the decease of such son or sons, the land I have given him or them shall be equally divided among all my other children or their heirs.” The testator had another son who died before the making of the will, leaving a daughter: held that the remainder over was good as an executory devise, and that the granddaughter took a share.

Neave v. Jenkins, 2 Yeates, 214.g

‘So, if a man makes a feoffment in fee to the use of A for life, or in tail, remainder to the use of B for life, or in tail, remainder to the use of

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himself and his heirs, or to the use of his own right heirs, yet the use being of the same nature with the land, comes back to him in the same manner as that would have done; and then having only disposed of part of the estate, the use returns, and brings with it the land for the residue of the estate undisposed of, as if it had never been out of him, and consequently, such residue shall go to the heirs by descent, and not vest in them by purchase;’ “And therefore, a lease for 1000 years made by the feoffor was holden good against the heir, because it took effect out of the reversion, which the use brought back to the feoffor himself.”

‘Cro. Eliz. 321; Dyer, 133; Leon. 182; 2 Co. 91; Moor, 284, 744; Co. Lit. 22 b.’

‘So, where one made a feoffment in fee to the use of himself for years, remainder to the use of A his son and heir apparent, and the heirs male of his body begotten, remainder to the use of the right heirs of the feoffor for ever, and after A died, leaving two daughters only, and then the feoffor conveyed the same lands to another of his sons in fee; it was adjudged a good conveyance, and that the daughters of the eldest son, though they were heirs at law, took nothing by purchase, for the eldest son dying without issue male in the lifetime of the feoffor, if the last remainder could have taken effect at all, it ought then to have so done, because the lease for years was not sufficient to support it till it came *in esse* afterwards, for then there would have wanted a tenant of the freehold in the mean time; and upon the death of A it could not take effect, because his father was then living, and could have no heir during his life; and therefore the remainder was void, and the whole estate revested in himself, by the resulting of the use in the same manner as if the limitation had been at common law without any use.

Co. 130; 2 Roll. Abr. 418, 791; Poph. 3; Moor, 720; Cro. Eliz. 334.

β Contingent remainders and executory devises are transmissible to the heirs of the party to whom they are limited, if he chance to die before the contingency happen.

Barnitz’s Lessee v. Casey, 7 Cranch, 456.

And it devolves from heir to heir and vests absolutely in him only who is heir to the first devise when the contingency happens and the executory devise falls into possession.

7 Cranch, 456.*g*

‘So, where the husband was sole seised in fee, and a stranger levied a fine to the husband and wife, and the heirs of the husband, and they rendered to the conusor for life of the husband, remainder to D for life, remainder to the right heirs of the husband, the husband died, and then D died; by the opinion of the court of wards and the three chiefs, it was held to be no remainder to the husband, but his ancient reversion, because the husband cannot limit a remainder to his right heirs where the fee was never out him, and therefore the interest of the wife was not gone by her joining in the grant and render, but that she should have it during her life against the heir of the husband.

Dyer, 237, pl. 31, 190 a; 2 Roll. Abr. 414; Leon. 102.’

“And there a case is cited, where such fine calling it a remainder was not received: for if it were, this would be an easy evasion to defeat the lord of wardship, marriage, &c., of the heir, though his ancestor always continued seised of the ancient fee till his death, and the same by priority

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of right attached in his heir immediately upon his death, as included within the words of the first donation.

“If a man had made a feoffment in fee before the statute of uses, to the use of himself for life, remainder to A in tail, remainder to the right heirs of the feoffor, and died, and then A died without issue, the heirs of the feoffor being within age, he should be in ward for the use coming to the feoffor in lieu of the land, for so much as was not disposed of shall be of the same nature with the land itself, and then such a remainder of lands in possession had been void, because it vested in the heir by descent in virtue of the first donation, which was the elder title. And so it shall be, where it is limited by way of use. But, where a man makes a feoffment in fee upon condition to re-enfeoff him, and the feoffee gives it to the feoffor for life, remainder to another in tail, remainder to the right heirs of the feoffor; there, in such case, his heir shall not be in ward by the common law, because, though he is in by descent, and not by purchase, as shall appear hereafter, yet he is not in the old reversion; for both the fee and the use of it were out of the feoffor, being made to a special intent, and therefore he takes it by descent as a remainder, for this shuts out the lord from the wardship, &c., because the intervening remainder upon the death of the feoffor is not held immediately of the lord, and so his ancestor died not seised of the fee within the tenure of the lord; as in the other case of the reversion he did; for that was held immediately of the lord, though he could not have the fruit of it till the determination of the intermediate estate. But in the other case, if the remainder-man in tail had died without issue, living the feoffor, then clearly upon his death, his heir would be in ward, because his ancestor died seised within the homage and fee of his lord. But this point of the wardship belongs to another head, and therefore no further occasion to explain it here.

2 Br. 6, pl. 93; Dy. 172, pl. 12, 237, pl. 30; Cro. Ja. 40; 2 Co. 92; 9 Co. 126, 132.”

§ A devise to the testator's wife until his son P should attain the age of 21 years, and after that then to P, his heirs and assigns for ever. But if P should die before he attained the age of 21 years or without issue, then the premises to descend to the testator's heir male in fee-simple. P attained the age of 21 years, but died without issue. Held that P took an immediate vested estate in fee-simple, liable to be defeated by his death before 21, but having attained that age it became an indefeasible estate.

Arnold v. Buffum, 2 Mason, 208.*g*

“If one makes a feoffment in fee to the use of himself for life, or in tail, remainder to the use of the feoffee, yet the feoffee hath no reversion, but it is in nature of a remainder, although the estate of the feoffor is executed by the statute, and the feoffee is in by the common law, which concurring with the statute law shall be preferred, since that can give him no more than what he has already by the common law. And the reason why this is a remainder seems to be, because the estate first moving from the feoffor, the use immediately resulted back to him in fee, and then, when he limits that use to himself for life or in tail only, with remainder to the use of the feoffee, though this cannot give him what he has already, yet it may well serve to declare in what manner he shall have it; and the use being limited in remainder, so shall be the estate, which takes it supported under such limitations.

Co. Litt. 22 b; Dy. 362; 1 Co. 137.

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“ One makes a lease for years, rendering rent, and after by will devises a further term to the lessee rendering the same rent, and devises over the inheritance to a stranger. The question was, if this should pass to the stranger as a remainder, or a reversion ; because the term and inheritance being both devised by will, which could not take effect till the devisor's death, he could have no remainder of that new term, and consequently could not devise such reversion to another. But yet, by the better opinion, this should be a reversion, because the rent would not be incident to it as a remainder ; and in wills, the intent of the party is principally to be regarded. *Sed qu.* because the rent may well go to the executors of the testator.

2 Leon. 33, *Machell v. Dunton*.

“ A copyholder surrenders to the use of A for life, and after to the use of the right heirs of the copyholder ; and at another time he surrenders the said reversion to the use of B in fee, and dies : and then A dies ; and the heir of the copyholder enters. And by Coke, he may ; for the land remains in the lord till his death, and then his heirs shall be in by purchase, and not by descent ; and if so, he had nothing in him to make a surrender of. And he said, the difference was between this case and where the surrender is, to the use of himself for life, remainder to another in tail, &c., remainder to his own right heirs, there, his heirs shall have it by descent. *Sed qu.* of this case, (a) for it appears by the books,” ‘that if a copyholder surrenders to the use of his last will, and devises to A for life, remainder to B in tail, or surrenders to the use of himself for life, remainder to the use of A for life, remainder to the use of his will, in these cases the reversion is so in the copyholder, that he may in his life surrender to the use of any other ; so that all who come in upon such surrenders are in by the copyholder, not by the lord, for that nothing remains in the lord, but so much as is not disposed of remains in the copyholder as strongly as if it had been limited to him :’ “ And that in these cases the heir may enter before or without admittance ; and it is likened to a feoffment in fee to the use of his last will, notwithstanding which he may dispose thereof in his lifetime : and it is also agreed, that a surrender to the use of the right heirs of J S, who is then living, is void, or to an infant *en ventre sa mere*, or to the use of one after his death, because the freehold cannot expect. And yet, in these cases, if the estate might continue in the lord in the meantime, they might be good ; and Coke agrees in the principal case, that if the ancestor had taken an estate for life, his heirs should have it by descent, and not by purchase ; therefore it seems to be the same where the law gives him an estate for life, as in this case it does, till the future use comes *in esse*, and then the heir cannot have it by purchase ; and consequently the ancestor's surrenders to the use of a stranger good. *Quære ergo*.

1 Leon. 102 ; *Allen v. Palmer*, Supplement to Co. Copyh. 3 ; Cro. Ja. 376 ; Cro. Eliz. 148, 441 ; Leon. 102 ; 4 Co. 23. [(a) This distinction taken by Coke is questioned by our author in his law of Tenures, (p. 172,) and also by Mr. Fearn, (Contingent Remaind. 66, 67, 7th edit.) It has indeed been recognised in the case of *Roe v. Quartley*, 1 Term R. 634 ; but as it is now settled that the surrenderer of a copyhold taking the ultimate limitation is in of his *old* estate, (see *Roe v. Griffith*, 4 Burr. 1952 ; *Smith v. Trigg*, 1 Str. 487 ; *Thrustout v. Cunningham*, 2 Bl. R. 1046,) it should seem, that the above case of *Allen v. Palmer* is (notwithstanding its recognition in that of *Roe v. Quartley*) not now law. See *Watkins's Gilb. Trin.* 456 ; Co. Copyh. 97, Suppl. 3, 13, 15, 75 ; Cro. Ja. 376.] || *Watkins's Cop.* vol. i. 95, 98.]

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‘If a man seised of lands in fee by his will in writing devises them to one for life or in tail, remainder to his own right heirs, this is void as a remainder, and the heir shall be in of the old reversion by descent, because immediately upon the death of the ancestor the estate descends to the right heir, and so prevents him from taking by the disposition of the will.

Hob. 30 ; 10 Co. 41 ; Vent. 372.’

So, if a man devises land to his heir at law, paying a sum of money or an annual rent, yet the heir, notwithstanding such incumbrance or charge, takes by descent, and not by purchase.

Salk. 241, pl. 2 ; Com. 72, pl. 45, Clark v. Smith ; and vide title *Descent*.

But, where the estate devised is altered in quantity or quality, there the devisee, though heir at law, takes by purchase ; as, where A seised in fee of lands, hath issue B and C, his daughters, B hath issue D, and dies ; A devises his lands to D in fee ; D dies without issue ; his heir of the part of his father shall take the whole by purchase, and not any part by descent.

Salk. 242, pl. 3 ; 2 Ld. Raym. 829 ; Com. 123, pl. 86, Redding v. Royston.

A, in consideration of a marriage intended between him and B and of a marriage portion, made a feoffment in fee to the use of himself and his heirs till the marriage, and after to B for life, then to trustees and their heirs during the life of A, to support contingent remainders, then to the first, second, and other sons of his body in tail-male, then to the heirs male he should have by any other wife, and for want of such issue to the heirs of the body of A, with remainder to his own right heirs ; the marriage takes effect, and they have issue only a daughter ; then A levies a fine to the use of himself for life, remainder to his wife for life, remainder to C in fee with warranty ; and the question was, What estate was vested in A by the first deed, viz., Whether the heirs of the body should take by purchase or descent ? For if by purchase, then the fine levied afterwards was no bar to them. And the court was of opinion, that they must take by purchase, because where the ancestor has no estate for life, as in this case he has not, they cannot be words of limitation ; and here the estate is expressly limited to trustees and their heirs during his life ; (a) and though a man cannot make his own right heirs purchasers by the name of heirs, either in a conveyance by way of use, or by his last will, yet he may make them so of an estate-tail, which is a new created estate, different from what the law makes.

4 Mod. 380 ; Carth. 272 ; Ld. Raym. 33, Tipping v. Cossins ; and vide Preced. Chan. 435, S. C. cited ; || Fearn, C. R. 43, (7th ed.) (a) By reason of the express limitation an estate for life could not arise to A by implication, which distinguished the case from Pybus v. Mitford, *anté*, p. 306.||

A settlement was made by A to the use of himself for fifty-nine years, if he should so long live, remainder to trustees and their heirs during his life to support contingent remainders, remainder to B, his son, for ninety-nine years, if he should so long live, remainder to trustees and their heirs during his life to support contingent remainders, remainder to the first and other sons of B, in tail-male successively, with other remainders over, remainder to the right heirs of A. Then A by will devises all his lands in possession, reversion, or remainder to trustees and their heirs, in trust by sale or mortgage to raise money for payment of his debts and legacies : and if this limitation to his own right heirs vested the reversion in fee in

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himself, so as to be subject to his disposition, or if the heirs were to take by purchase, was the question; all the intermediate remainders being determined. And it was argued upon the reason of the above case of *Tipping and Cossins*, that the heirs must take by purchase, because he had only an estate for years, and the freehold during his life was expressly limited to trustees and their heirs, and therefore against his own express limitation he should have no resulting use or estate for life. But on the other side it was argued, that the reason of the resulting estate for life was, because it might possibly happen that all the intermediate estates might determine before the death of A, as by his and the trustees joining in a feoffment, &c., which would be a forfeiture of their estates, &c., and therefore of necessity he must have a resulting use for his life: And my Lord Chancellor was clear of this opinion, and said it was his old reversion in him, and devisable by will. But note, this was a remainder limited to his own right heirs.

Eq. R. 20; Preced. Chan. 338, *Eure v. Howard*.

"It appears by what has been already said," "That wherever the ancestor takes an estate for life, {1} and after in the same conveyance a remainder is limited mediately or immediately to his right heirs, or to the heirs male or heirs female of his body; that in such case the right heir or heirs male or female, &c., shall not be purchasers, but shall take by descent.

Co. 93, *Shelly's case*; *Moor*, 136; *And*, 69, and the S. P. cited in numberless cases.' {1} This rule takes effect where an estate of freehold is given, though it be only during widowhood. 12 Ves. J. 89, *Curtis v. Price*.} || Vide as to the extent and effect of this rule in construction of limitations in deeds, marriage articles, and wills, *Fearne's C. R.* 28, 201, (7th ed.) *Butler*; and vide *Blackstone, J.'s*, argument in *Perrin v. Blake*, *Harg. Tracts*, 489; and *Mr. Hargrave's observations* on the rule, *Ibid.* 551; *Butler's note*, 1 Co. Lit. 376 b, (17th ed.)|| βA devise to the testator's daughter A, during her natural life, for her sole use and behoof, and at her decease unto her male heir, viz., B, if alive at her death, to him and to his heirs and assigns for ever; otherwise unto her next male heir, unto him and to his heirs and assigns for ever; held, that A took an estate for life with a contingent remainder in fee to B, or to such person as in the event of the death of B, in the lifetime of A, should be her next male heir. *Dunwoodie v. Read*, 3 Serg. & R. 440.g

'Therefore if a lease be made to A for life, remainder to the heirs male or heirs female of his body, or to his right heirs, in this case the remainder is executed presently in A, and he is seised in fee or in tail, according to the respective limitation.

2 Roll. Abr. 417; *Roll. R.* 317; *Raym.* 163.' {So a devise of lands to A for life, remainder to her heirs and their assigns for ever, vests a fee-simple in A. 1 Day, 299, *Bishop v. Selleck*.}

'So, if one make a lease to A for life, or a feoffment in fee to the use of A for life, remainder to B for life or in tail, remainder to the right heirs of A, or to the heirs male or female of the body of A, in this case the heirs or heirs male or female of A shall not be purchasers, but shall take the remainder by descent from A, for it was so executed as a remainder in A that he might give or forfeit it as such in his lifetime.

Lit. sect. 578; Co. 104; 2 Roll. Abr. 415.'

"And the reason of these cases seems to be, either the prejudice that might ensue to the lord, or to the donor, by the loss of wardship, marriage, &c., if such heirs should be purchasers, because they then claiming nothing from their ancestor by hereditary succession, would not be liable to the terms and conditions affixed to the hereditary succession only, and then every one would make his heirs purchasers; or from the prejudice

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that might happen to the heirs themselves, by the loss of such remainder, if the ancestor should do any thing to forfeit or determine his estate for life after the determination of the intermediate estate; for they not being capable of taking such remainder when the preceding estates ended, they could never after lay claim to it, and so an unwary ancestor might defeat his heir of the purchase; or lastly, from the conformity and parity of reason these bear to a limitation to A and his heirs, or the heirs male or female of his body; for, as this gives an estate for life by implication and more, so the other gives him the same in express words and more, *et expressio eorum quæ tacite insunt nihil operatur*. And though there be the interposition of another estate between them, that only breaks the order of the limitation, not the operation of the words, which being the same in both cases, ought to have in both cases the same operation and construction. But, if a lease be made to A, or a feoffment to the use of A, for years, remainder to or to the use of B for life or in tail, remainder to or to the use of the right heirs, or heirs male or female of the body of A, these remainders are perfectly contingent and uncertain whether they shall ever take place or not; for if the remainder determine living A, then they are become void, because *non est hæres viventis*, and they cannot take during the life of A, and then these would want a tenant of the freehold, and a tenant to do the services to the lord in the mean time, which the law will not suffer. So, and for the same reason, if a lease be made, or a feoffment in fee to the use of A, for years, remainder to the use of J S, who is then living, or to the wife whom J S shall marry, these are likewise void. It is no objection in the case of the wife, that she cannot do the services in her own person, for her husband would be obliged to do them for her; and, as a recompense, would be tenant by the curtesy after her death."

[2 Burr. 1106.]

'Tenant for life, remainder in tail, remainder to the right heirs of tenant for life; the tenant for life acknowledges a statute and dies, he in remainder dies without issue; and the question was, If the right heir of the tenant for life should be charged by this statute, and the lands in his hand liable thereto? and adjudged that they should, for that they came to him by descent from the tenant for life, who had them as a remainder vested in him, and might either grant or charge it.

Cro. Eliz. 355, *Pethouse v. Crane*. || *Abel's case*, 18 Edw. 2, fol. 277, Blackstone's arg. in *Perrin v. Blake*, p. 501. ||

In dower it was found by special verdict, that the husband of the demandant was seised of the lands, &c., for his life, remainder to A and B, trustees, for ninety-nine years, remainder to the heirs of the body of the husband; and the question was, Whether this was such an estate-tail executed in the husband, whereof his wife should be endowed? and adjudged that it was, and that the intervening estate to the trustees being only for years ought not to be regarded.

Ld. Raym. 326; Salk. 254, pl. 4; Lutw. 719, *Bates v. Bates*.

"If a feoffment be made to the use of A and B, during their joint lives, and after the death of either of them, to the use of C for life, and after to the use of the heir or heirs of the body of B, this remainder is not vested in B presently, but is in abeyance or contingency to vest or not to vest as the case shall happen. For, if A and C die in the lifetime of B, the remainder is void, *quia non est hæres viventis*; and both their estates are determined, and yet the remainder cannot take effect. But, if B dies before

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A, then his heirs, or heirs of his body, shall have it by descent, as a remainder vested in B, for that upon his death before A, the whole estate for life is gone, as if it had been limited to B only for life; and if it had been so limited, his heir or heirs of his body should not have taken by purchase, for the reasons before mentioned.

2 Roll. Abr. 418." ||See this doctrine controverted by Mr. Fearne in his C. R. 31, 32, (7th ed.,) who argues, that the remainder vests in B; and vide *Merrell v. Rumsey*, *infra*, 752.||

¶In a marriage settlement, the uses were for the releasees until the intended marriage; then to the husband and wife, and the survivor of them during their natural lives; then to the use of their children in fee: but if they had no children, or such children should die in the lifetime of their parents, and the wife should survive without issue, then to her in fee. The marriage took effect, children were born, the wife survived the husband, and died leaving children. Held, that this was a clear remainder in fee to the children, which ceased to be contingent on the birth of the first child and opened to let in after-born children.

Carver v. Astor, 4 Peters, 1.

A testator devised a tract of land to a son and the wife of such son, to hold to them and the survivor of them during their natural lives, and from, and immediately after their decease, unto their heirs male, *habendum* to such heirs male and their heirs and assigns for ever, share and share alike; held, that the son and his wife took estates for life, and that their heirs male living at the death of the testator took a vested remainder in fee, which opened to let in after-born children.

Tanner v. Livingston, 12 Wend. 83; and see *Lessee of Barnes v. Provoost*, 4 Johns. 61.*g*

"Having considered the relation of ancestor and heir, let us now consider the relation of testator and his executors, or intestate and his administrators, upon remainders limited to them for years: as, for example, if a lease be made to A for life, or for ninety-nine years, if he so long live, and after his death, or after the determination of that estate, remainder to his executors for twenty, &c., years, this term vests in the testator himself, and he may give, grant, forfeit, or dispose thereof, as if it had been expressly limited to himself; and if he dies intestate without disposing thereof, it shall go to his administrators; for the testator and executors, or intestate and administrators, are correlatives as to chattels, as the ancestor and heir are for inheritances; and as heirs are properly made use of for lengthening out the inheritance to the same person, so are executors for lengthening out chattels to the same persons; and as heirs cannot take in the ancestor's life, so executors cannot take in the testator's life, because neither the one nor the other can be known till their death; and therefore as a remainder to the heirs vests in the ancestor himself, where he hath an estate for life therein, so does a remainder to the executors vest in the testator himself where he had before any interest limited to him. But, as heirs may be in some cases a word of purchase, so may executors be so. Therefore if one make a lease to A for ninety-nine years, if he so long live, and if he die within the term, or during the term, then to his executors or assigns for forty years, in this case his executors or assigns take by purchase upon the contingency of his dying within or during the term; for, if he survives it, they shall not take at all. And though in this case the term be expressly made determinable upon his death, and

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therefore he cannot properly be said to die within the term, or during the term, since that dies with him, and his death is the determination of it; yet, it being at first granted for ninety-nine years, if he so long live, his not living so long may well be made the condition of the vesting of a remainder to another; and it being uncertain, whether he will live so long or not, so is the vesting of the remainder uncertain; and by consequence it cannot vest in the testator himself, since he must be dead before it can be known whether it will vest at all; and then the executors or administrators, if they shall be construed within the word assigns, being the first takers, shall have it by purchase. Another reason for their taking by purchase in this case may be, that the owner intended not to part with the land any longer, if the first lessee outlived the ninety-nine years; but, if he died sooner, then he was willing to grant it out for a longer time, and therefore likewise the remainder was contingent.

1 Roll. Abr. 911; (3) 2 Roll. Abr. 448; Co. Litt. 44 b. 319 b; 1 Co. 134; Br. Abr. 37, p. 17; Cro. Eliz. 658, 666, 840; Moor, pl. 911; Yelv. 9, 85; Spark v. Spark, 2 Roll. Abr. 47, pl. 6; Moor, pl. 244, 459; 4 Leon. 239; Noy, 32; Owen, 125.

"If one make a lease for life to A, remainder to his own executors for years, this remainder is good, and the executors must take it by purchase; for a man cannot limit such an estate to himself, and therefore the term shall be in abeyance till his death. And this was construed to be a contingent remainder in the executors, because it cannot be to the party himself, for two reasons: 1st, Because he cannot be grantor and grantee to himself; and therefore where there are not proper parties, the one to convey, the other to take a right, the grant were itself a nullity, and would be of no significance, if it were not construed a contingent limitation to the executors. 2dly, Because having the old reversion, this term, if raised to the party himself, would be merged, and therefore that the party's intentions may take place, it was construed a contingent limitation to the executors.

2 Leon. 7; Dy. 309 b.

"And here the difference is between where a stranger limits an estate for life, the remainder to the executors of the tenant for life, for there the term for years in remainder is vested in the tenant for life, because the word executors is no more than a prolongation of his interest; and where a man limits an estate to himself for life, the remainder for years to his own executors, there, since it cannot, for the reasons before mentioned, admit of that construction, therefore it is a contingent term in the executors, who take it by purchase. But, where such limitation is expressly mentioned to be for the performance of the will, they do not take *jure proprio*, but as assets to fulfil the intention of the testator.

Cro. Eliz. 666; Moor, pl. 244; Dy. 309, in marg. 314; 1 Leon. 346; 2 Leon. 5; 3 Leon. 20.

"One levied a fine to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his executors for twenty years, or to them, without any remainder to his wife; and after he levies a fine, or makes a feoffment to other uses; and then by his will makes three executors, and dies. The term to the executors shall never arise: for whether this term were in abeyance, as the books say it was, so that he himself could not grant, forfeit, or release it; or whether it vested in the testator himself, yet by such fine or feoffment it is confounded and gone; because if it be an interest vested, it passeth by the feoffment; if it be not vested,

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the feoffment destroys the particular estate, and then the contingent remainder sinks of course.

Moor, pl. 459, 1024.

"If a lease be made to A for life, and after his death to the executors or assigns of B, this is no interest in B, but only a naked power in him to name executors or assigns who shall take the term.

Yelv. 85.

"But, if one make a feoffment in fee to the use of himself for life, and after his death to the use of his administrators for twenty-one years, remainder over; this limitation is absolutely void, and the other remainders shall vest presently, by reason of the interval between the death of the feoffor and the taking out letters of administration, before which time there is no person to take it; and there can be no occupancy of it in the mean time, for the law will not create new estates to supply the intention of the parties.

1 Leon. 196."

β Testator devised as follows: "I lend unto my daughter, A W L, the following slaves, &c., all during her natural life, and, after her death, to the lawful heirs of her body, if there be any; if not, to be divided among my other children and their heirs." Held, that the words, "heirs of her body," were descriptive of the persons of those in remainder, and that A W L was only entitled to a life-estate, with remainder to her children.

Hickman v. Quinn, 6 Yerg. 96.

A devise to A B for life, and, at his death, to return to his children for ever, gives to the children a contingent remainder, for the persons are uncertain; they may increase or diminish in number before the termination of the particular estate: if any should be born after making of the will, they would be entitled to claim; if any died, their representatives could not.

Boone v. Dyke's Legatees, 3 Monr. 537. See Carver v. Astor, 4 Peters, 1.g

(C) Of the several Kinds of Remainders, as distinguished into Remainders vested, or in Contingency and Abeyance.

β In case of doubt, vested remainders are favoured rather than contingent remainders.

Olney v. Hull, 21 Pick. 311; Bowers v. Porter, 4 Pick. 198; Shattuck v. Stedman, 2 Pick. 468; Dingley v. Dingley, 5 Mass. 535.g

"If an estate be limited, either at common law, or by way of use, to one for life, or in tail, remainder to the right heirs of J S, who is then dead, this is a good remainder, and vests presently in the person who is heir at law to J S by purchase; and though a daughter be then heir at law, and after a son be born, yet shall the daughter retain the land against him; for she being heir, and coming within the description at the time when the remainder was limited, it then vested and settled in her immediately as a remainder by purchase, and shall not by any accident after be defeated.

2 Roll. Abr. 415; Co. 95, 103; Plow. 56.' β A vested remainder in fee may be taken in execution, and sold by virtue of an execution against the remainder-man. Den v. Hillman, 2 Halst. 180; Kelly v. Morgan's Lessee, 3 Yerg. 438. But a remainder in slaves cannot be levied on and sold by execution at law. Allen v. Scurry, 1 Yerg. 36.g

"So, if the land be of the nature of gavelkind, yet the eldest son only as heir shall take it, and not all the sons; for the custom extends only

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to descent of inheritances, and not to purchases, and is to be taken strictly.

Hob. 31; 1 Co. 103; Dav. 31; 1 Br. Abr. 254, pl. 42.

‘But, if J S be living at the time of the remainder limited to his right heirs, this puts such remainder in abeyance or contingency; that is, in no person, but *in nubibus*, till the contingency happens. For in the feoffor or donor it is not, because he has limited it out of him, and all remainders must pass out of him at the time of the limitation, though they do not presently vest in the person intended: and in the right heirs of J S it cannot be, because he cannot have heirs during his life; so there is no person *in rerum naturâ* within the description, to take it; therefore it is in the mean time in abeyance or expectancy, to vest or not vest, as the case happens: for if J S dies during the particular estate, then the remainder presently takes place in his heirs; but, if the particular estate determines by death or otherwise in the life of J S, then such remainder is become totally void, and can never vest, but the estate settles again in the feoffor or donor, as if no such limitation in remainder had been; and he becomes tenant to the *præcipe*, and is obliged to do the services; and though J S die soon after, yet his heir can have no benefit by it, not being capable of taking the remainder when it fell.

Co. 133; Co. Litt. 378 a; 2 Co. 51; 2 Roll. Abr. 415; Plow. 28, 556; Poph. 74; Moor, 720; 3 Co. 20; 10 Co. 50; Raym. 145; Pollex. 56.’ ||But Mr. Fearné ably controverts this doctrine; and contends that the remainder vests in the feoffor until the contingency happens. Fearné C. R. 362—364, (7th ed.)|| #See Barnitz’s Lessees v. Casey, 7 Cranch, 456.g

“But here it may be objected, that then these remainders ought to escheat to the lord, as well as where his tenant dies without heirs; for they actually passed out of the feoffor: and though they cannot vest in the person intended, yet it is not reasonable that they should return to the feoffor against his own grant, and when he has by his own act parted with and given them away; but the lord ought rather to have them by escheat. In answer to this objection, it is to be observed, that the reason of the escheat is the death of the tenant without heirs: so are the words of the writ,—*Præcipe A quod reddat B decem acras terræ cum pertinentiis, &c., quas C tenuit et quæ ad ipsum B reverti debent, tanquam eschæta sua eo quod prædictus C obiit sine hærede.* But J S neither died without heir, nor, if he had, was he ever tenant to the lord: for nothing vested either in him or his heirs, and therefore the lord can have no escheat as from them; and as to the feoffor, he or his heirs are still *in esse*; and since the grantor could not take the remainder, and no other person has right to claim it, it must return back again, and settle in the feoffor, as if no disposition thereof had been made.”

‘But, if there be no such person as J S at the time of the limitation, though he be after born, and die during the particular estate, yet his heirs shall never have the remainder. So, if a remainder be limited to A, son of B in tail, &c., or to E, wife of D, where in truth there is no such A or E, though B has a son after called A, or D marries one E, yet they can never take the remainder; because, if there be such persons as the words of the gift import, there the remainder ought to vest in them presently, and they will never after be made capable of taking it; but, if there be no such persons then *in esse*, none who come within that description after can lay claim to it, because the limitation was present to such persons. But a re-

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mainder limited *primogenito filio*, or *proximo hæredi masculino* of A, or *propinquioribus hæredibus de sanguine puerorum*, or *seniori puero* of A, or to the right heirs of A, there being then such A *in esse*, or to the wife that A shall marry; these are good remainders, and shall vest when such persons come *in esse* as are within the description; because here appears no present regard for any person in particular; and therefore if they answer the description at any time before the particular estate determines, it is time enough: and so there is a diversity between a remainder limited to one by name in particular, and such a remainder limited by description or circumlocution, or between a general name and a special name.

Co. Lit. 3; Co. 66; 2 Co. 51; Hob. 33; Moor, 104; Dyer, 337; 2 Leon. 218; Roll. R. 254.

§ Contingent remainders and executory devises are transmissible to the heirs of the party to whom they are limited, if he dies before the contingency happens, in such case it does not vest absolutely in the first heir, but in him who happens to be heir to the first devisee, at the time when the contingency happens and the executory devise falls into possession.

Barnitz v. Casey, 7 Cranch, 456.

A contingent remainder may take effect in some and not in all the persons to whom it is limited, according as some may come *in esse* before the determination of the preceding estate and others not; and such grantees take jointly, notwithstanding the difference of the time of vesting.

Wager v. Wager, 1 Serg. & R. 374; Tanner v. Livingston, 12 Wend. 83; Lessee of Barnes v. Provoost, 4 Johns. 61.

“Lands devisable by custom were devised to A for life, remainder to B in tail, remainder to the next heir male of the devisor, and to the heirs male of his body; the devisor dies; A enters; B dies without issue; and after A dies; and then one C as heir of the devisor, viz., daughter of D, son of the devisor, enters and aliens in fee, and after hath issue E, who, as heir male of the body of the devisor, enters upon the alienee, who brings trespass. *Optima opinio*, that as the first who entered as heir to the fee-simple was a female, and there was no heir male of the devisor to take when the remainder fell, he who is born after shall not have it.

1 Br. Abr. 234 b, pl. 5; Hob. 33.”

‘A makes a lease to B for life, and after the death of A, to remain to B and his heirs; this remainder is contingent, and cannot vest presently, for if A survives B it is void; because otherwise the operation of livery would be interrupted during the life of A, for he cannot give himself any estate, his livery operating to pass estates from him, not to give any to him who had the whole before; and therefore during his life the operation of the livery must cease, and by consequence no remainder can take effect in virtue of that livery, which *pro tempore* being at an end, all that depended thereon ceases too, and can never after be revived; for the livery must carry out all the estates at once from the feoffor, and if he comes again into the possession before they can all take effect, this breaks the force of the livery, and brings back again to him all that such livery had taken out from him, and then they can never take effect but by a new livery. And this is the reason of the common case, that one cannot give lands to another to begin after his death, because being to make livery presently, if that cannot operate presently, it can never operate at all; for it is a contradiction to give lands to one by a solemn livery, which is an act executed

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and works presently, and yet by words to restrain that operation to a future time. But in the principal case, where A dies first, there no interruption is of the livery, for B had an estate for life by virtue thereof; and before that determines, the same livery, which carried the remainder in abeyance, for the uncertainty of its taking effect, does upon A's death direct and settle, or bring down the remainder to B and his heirs.

10 Co. 85.' || *Sed vide* Fearn, C. R. (7th ed.) 30, 31.||

"If a lease be made to A for life, remainder to the right heirs of J S and J N, and after J S dies, and then tenant for life dies in the life of J N, the remainder for a moiety vests in the right heirs of J S, and upon the death of J N his heirs shall take nothing, because not *in esse* to take when the remainder fell; and the right heirs of J S cannot take the whole, because that was limited to them and others jointly.

1 Br. Abr. 253, pl. 21."

β A testator devised lands to his widow for life, and "after her death to go to the male heirs of my son Tobias in fee, if any he gets, and for want of male heirs, it shall go to the males of John in fee;" at the death of the widow, Tobias was unmarried, but afterwards married and had children; it was held, that the limitations over after the death of the widow were concurrent contingent remainders, and for want of male heirs of Tobias, at the death of the widow, vested irrecoverably in the heirs of John.

Stehman v. Stehman, 1 Watts, 466; and see *Lessee of Westbrook v. Romeyn*, Baldwin, 196.*g*

"If brother and sister are, and lands are let for term of life, remainder to the right heirs of the brother, and after the brother dies, and then tenant for life dies, and the sister enters; she shall retain the land against a son or daughter of the brother born after, because this vested in her by purchase.

1 Br. Abr. 253, pl. 21."

'If a lease be made to A, B, and C for their lives, and if B survives C, then to remain to B and his heirs, this remainder is in abeyance, because, though the person be certain, yet since it depends on C's dying before him, till that be known, the remainder cannot vest. So, if a lease be made to A for life, and after the death of B, who is a stranger, to remain to C in fee, or to A in fee, these remainders are in abeyance or contingency, and depend on B's dying before C or A, for if he survives them, the remainder cannot take effect.

3 Co. 20; 10 Co. 85; Co. Lit. 378.

'If a lease be made to A for life, remainder to the abbot of D and his successors, though the abbot be then dead, so as there is then no abbot at all, yet the remainder shall be good, if an abbot be made before the death of A. So of a remainder to a mayor and commonalty, dean and chapter, prior and convent, &c., though there be then no mayor, or dean, or prior. So of a remainder to the bishop of D, parson of D, or other sole corporation, and his successors; for these remainders not being limited to them by name specially, but to them generally, and so whoever comes within the description before the determination of the particular estate, is capable of taking by virtue thereof, are good remainders in abeyance, &c. But if there be no such corporations at the time of the limitation, then the remainders are totally void; and none created after, though by the same

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name, can take these remainders, though a patent be then passing to make such corporation.

Co. Lit. 264; Hob. 33; 2 Co. 51; 10 Co. 31; Moor, 104; Roll. R. 254; 2 Buls. 275.

“A having issue two sons and two daughters, devises his lands to his younger son in tail, and for want of such issue to the heirs of the body of his eldest son, and if he die without issue, then to his two daughters in fee, and dies; the younger son dies without issue, living the eldest, who has issue; and if this issue should take the remainder, his father being alive, was the question. It was urged, that though in case of a grant he could not, yet being here in case of a will, the intent of the devisor should prevail to carry it to him. But the court was strongly against it, and held no difference, as to this, between a grant and a devise, (a) and would suffer no witnesses to be heard to prove the testator's intent, but gave judgment for the daughters.

Challoner v. Bower, 2 Leon. 70.” ||(a) It is not, however, to be understood, that there is no difference between a grant and a devise as to the construction of limitations to the heirs of persons living; for in devises these words are often held to create a vested instead of a contingent remainder, where it appears from the expressions of the testator that he intended them to be used as synonymous with “heir apparent;” that is, as a *designatio personae*, pointing at the particular person whom he intended to take; in such case the devisee takes a vested remainder by purchase. But, in the case in the text, the language of the devise does not show any such intention on the part of the testator, as must appear in order to control the rule that *nemo est hæres viventis*, and to take the case out of the class of contingent remainders. Vide Burchett v. Durdant, 2 Vent. 311; Darbison v. Beaumont, 1 P. W. 229; Fearn, C. R. (7th ed.) 210.||

β A testator devised land to his wife for life, and after her decease to his two daughters, A and B, their heirs and assigns, but in case they should die without issue, then the same to vest in their two sisters C and D. Held, that the devise to A and B was a fee-tail, and not a fee-simple, and that the estate to C and D was a vested remainder to take effect upon the death of both A and B without issue.

Lillibridge v. Adie, 1 Mason, 224.g

“If one covenant, upon proper considerations, to stand seised to the use of A for life, remainder to the right heirs of B, in this case the remainder is not drawn out of the covenantor, and put in abeyance till the death of B, but there is a reversion left in the covenantor, out of which the remainder, when it happens, shall be drawn. And this differs from the remainders before mentioned, which arise out of the estate executed either at common law, or upon a feoffment to uses, as will appear hereafter.

Hob. 74; Barn's case, 1 Ventr. 374.”

‘If a man make a lease to A for life, and that after the death of A, and one day after, the land shall remain to B for life, &c., this is a void remainder, because not to take effect immediately upon the determination of the first estate, and so during that time there would be an interruption of the livery, and no tenant of the freehold, either to do the services, or answer to strangers' præcipes.

Plow. 23; Raym. 144.’ β No remainder can exist without a preceding estate to support it. Wilkes v. Lyon, 2 Cowen, 333.g

‘A lease is made to A for life, remainder to the right heirs of B, and after B purchases the estate of A, yet the fee is not executed in B, but the remainder to his right heirs continues distinct; for if A dies first, the remainder will be void; and if B dies first, yet there will be an occupancy

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during the life of A, and the remainder immediately upon B's death vests as a remainder in his right heirs.

2 Leon. 7.

'If a lease be made to A for life or in tail, remainder to the heirs male of the body of B, if B hath issue two sons, and the eldest dies leaving a daughter, and then B dies, living A, yet the youngest son shall not take this remainder; for he who takes by purchase and original vesting, must answer the description exactly, which here the youngest son does not, for he ought to be heir as well as male, and this he is not, for the daughter of the eldest son is heir, and she cannot take because she wants part of the description too, not being male, and therefore neither of them can take, but the remainder shall be void. So, if such lease or gift in tail be made to A, remainder to the heirs female of the body of B, and he have issue a son and a daughter, and die, living A, yet the remainder shall be void for the reason before mentioned. Otherwise it is, if a gift be made to one and the heirs male or heirs female of his body, &c., for there, *per formam doni*, they shall take by descent though another be heir, for there the whole estate-tail is in the ancestor; but in the other cases the ancestor takes nothing.

Co. Lit. 24, 25, 164 a; Hob. 31; Co. 102; Dyer. 374; 2 Roll. Abr. 416; 1 Br. Abr. 235, pl. 5, 254, pl. 61; 2 Br. 94 b, pl. 1, 95, pl. 40.' ¶Vide Mr. Hargrave's learned note, Co. Lit. 24 b, n. 3; and see *contra* Wills v. Palmer, 5 Burr. 2615.¶ 8 Vide Tanner v. Livingston, 12 Wend. 83.g

"If a lease for life or a gift in tail be made to A, remainder to the right heirs, or heirs male, or heirs female of the body of J S, who is then or after attainted of treason or felony, and is executed or dies, and then after A die; yet this remainder is become void, and can never take effect; because none can be heir to a person attainted, nor can he have heirs male or heirs female of his body to take by purchase. But, upon a gift to a man and the heirs male or female of his body, if he were attainted before the statute of 26 H. 8, and at this day, if he be attainted of felony, such heirs shall take by descent *per formam doni*, upon construction of the statute *de donis*, W. 2. But, if a remainder be given by act of parliament to the right heirs of J S, who is attainted of treason or felony, this remainder is good, because the act takes off the disability, and restores the capacity as to such remainder; especially if the attainder be taken notice of in the act; for then it is in nature of a restitution, and *parliamentum omnia potest*; and though a person attainted can have no heir, yet by such description it is sufficiently known who is meant by it, and then the act supervenes with its absolute power to enable him to take.

Br. Abr. 253, pl. 42, 254, pl. 61; 2 Br. Abr. 94 b, pl. 1, 95, pl. 40; 1 Co. 103; Hob. 31, 32; 1 Lev. 75; St. Tr. 53; 1 Keb. 349, 615, 745, Wheatley v. Thomas.

"Three brothers are—the second settles his estate to several persons in tail successively, remainder to his own right heirs: the eldest brother is attainted of treason and executed, leaving several children: the second brother dies without issue: all the estates-tail determine; and the youngest brother being dead, his issue claimed the reversion as heirs to the second brother, and the defendant claimed by escheat, and had a verdict in ejectment. For though the blood of the elder brother be corrupted, so that his issue cannot take; yet they, being heirs at law, stand in the way of the youngest brother, so that he or his issue cannot take, and therefore

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the land must escheat. But this more properly belongs to another head, and therefore I shall here consider it no further.

3 Keb. 351; Collman v. Barton, Cro. Car. 435; Hob. 334; Co. Lit. 8 a." ^βNo attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted. Const. U. States, article iii, sec. 3. See Borland v. Dean, 4 Mason, 174; Maclay v. Work, 5 Binney, 154; Dietrick v. Mateer, 10 Serg. & R. 151; Jackson v. Catlin, 2 Johns. 248; S. C. 8 Johns. 520; Sleight v. Kane, 2 Johns. Ca. 236; Jackson v. Prevost, 2 Caines, 164. Attainder of the husband is not a bar to the wife's dower. Palmer v. Horton, 1 Johns. Ca. 27.g

"If one makes a lease for years either at common law or by way of use, remainder to the right heirs of J S, who is then living, or to the wife whom J S shall marry, these remainders are void; because, till the death or marriage of J S, there is no person to take the freehold, and that cannot be in abeyance, as has been proved already. But it is said, if such limitation were by way of use before 27 H. 8, it would have been good; because the estate in law continued in the feoffee, and they were tenants to the lord, and all præcipes were to be brought against them. And though one book seem *contra*, yet the reason there given is only, that the remainder ought to be limited to one *in esse*, which seems to carry very little weight in it, when no reason of necessity or convenience requires it; and therefore the other opinion seems to be law.

1 Co. 130; 3 Co. 20 a; Sir T. Raym. 83; Poph. 482; Co. Lit. 217 a; Dav. 34; 4 Leon. 21; 4 Mod. 256; 1 Co. 135; Godb. 319, *contra*."

'So, if one makes a lease to A for twenty-one years, if he or if B shall so long live, and after the death of B, or after the death of A, to the first son of the body of B in tail, and so to the second, &c., in tail, remainder to C in fee; all these remainders are void, because the first estate being but for years, and the remainder not to take effect immediately after those years, but at a future time, after the death of A or B, which may be long after, and so during that time there would be an interruption of the livery, and no tenant of the freehold, therefore these remainders are void; and though it happen that A or B die within the term, yet till their death the freehold would be carried into abeyance, and could not vest in those in remainder for the uncertainty of the death of A or B within the term; and therefore the happening of that after cannot save the remainder, which was void before. But, if such lease had been made, and then it had been limited, after the determination of that estate, or after the expiration of the said term, to C for life, or in tail, &c., this had been a good remainder executed presently, as if a lease for years had been absolutely to one, remainder to another for life, &c., for here was no interruption of the livery, or want of a tenant of the freehold.

Moor, 488, pl. 686; 3 Co. 20; Raym. 144; Plow. 83; Vaugh. 46.

'A by indenture makes a lease to B for forty years, if A so long live; and after her death to C ||and D, their executors, administrators, and assigns, severally and respectively,|| (who were no parties to the deed,) for one thousand years, and then A levies a fine to different uses, and dies; and five years pass after her death, and then the plaintiff claiming under C and D entered, &c. By the arguments and reasons of the case, it seems clear that this is no remainder at all to C and D; for first, presently it cannot vest by reason of the lessor's life interposing; and therefore it is no remainder vested. Secondly, as a contingent remainder it cannot be good; because then it ought to have a particular estate to sup-

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port it, and ought to be in abeyance or contingency, to vest or not vest when that determines: but here, the first lease is no such particular estate; because that reaches not to the commencement of the remainder, nor is the remainder limited with any regard to the particular estate; because it is not to commence upon the determination of that, but at a future time, viz., upon the death of the lessor. And there is no contingency at all in the case, for it is to take effect at all events, upon the death of the lessor, be it before or after the end of the term, and therefore it can be no other than a future *interesse termini* to begin after the death of the party that grants it, which being but for years, it may well do; because it inures by way of contract. And though the grantee there was no party to the deed, and therefore, as objected, could take nothing, yet it appears that judgment was given for the plaintiff; which proves, first, that the grantee had an interest; secondly, that this interest was not barred by the fine and five years' non-claim after the death of the grantor, not being touched, divested, or turned to a right. Thirdly, that though the grantee was no party to the indenture, yet he might well take by virtue thereof, if he gets the indenture to make out his title, for the grantor cannot derogate from his own grant, or avoid his own acts.

Raym. 140, Corbett v. Stone.' ||Vide Fearn's C. R. 285, (7th edit.) by Butler, where Mr. Fearn questions the reasons used by the court, in Raym. 151, but thinks the judgment may be accounted for on the ground of A having the freehold and reversion in herself, on which the fine might operate without tort, and of her being only tenant at will as to the possession to her own trustees of the 40 years' term.||

"But, if a man devises lands to A for five years from Michaelmas next ensuing, and after to B and his heirs, and dies before Michaelmas, yet is the remainder good, because till Michaelmas the freehold descends to the heir, and he is tenant to all the purposes, either of doing the services, or answering to strangers' præcipes. For here is no livery to operate presently, and therefore no inconvenience to allow of such future limitations, as it would be, if it were by deed executed with livery. And in Noy it was held, that a devise for years, remainder to the right heirs of J S, was good, if J S died within the term, because the freehold in the mean time descended to the heirs, and was not in abeyance.

Cro. Eliz. 878; Poph. 4; Sir T. Raym. 83; Plow. 156; Co. Lit. 217 a; Noy, 43; 4 Mod. 259, 283; Swinb. 124; Godolph. 360."

"If a man surrenders copyhold, or makes a feoffment in fee of freehold lands to the use of his wife for life, remainder to the heirs of the body of the surrenderor and his wife, this is a contingent remainder not executed in the wife, because he who will take by it must make himself heir of both their bodies, which cannot be before the death of both; and then if the wife, who has the particular estate, dies first, the remainder is become void, because it cannot vest when the particular estate determines. So, if such feoffment or surrender had been to the use of the wife and a stranger for life, remainder to the heirs of the husband and wife, this remainder also is contingent; for though the wife dies, yet it shall not vest till the death of the husband, and if he survives his wife and the stranger, the remainder is become void, for the above reason.

Roll. R. 238, 317, 438; 2 Roll. Abr. 416; Dyer, 99; Leon. 102.

'A, in consideration of a marriage intended between him and B, covenants to stand seised to the use of himself for life, remainder to his wife for life, remainder to the heirs male of their bodies, remainder to C in tail: the marriage takes effect: the husband and wife join in levying a

fine. It was adjudged, that the estates for life to the husband and wife stood so distinct, that they were not merged or confounded in the estate-tail, being limited all in one and the same conveyance, and that the fine levied by them was not any discontinuance either of the estate-tail or remainders; for if the estate-tail should be executed in the husband and wife, then the wife would have an estate in possession, whereas by the conveyance she was only to have a remainder: also, the husband would have only a moiety, whereas he was to have the whole during his life; but yet the remainder in tail vests in the husband and wife as a remainder; so that the heirs of their bodies shall take it by descent, and not by purchase.' "For there is no contingency in the case, but when one dies, the other is tenant in tail executed. So, for the same reason, if a lease be made to A for life, remainder to B for life, remainder to A and B, and their heirs, or to the right heirs of A and B, this remainder continues distinct, and is not executed in possession. And these remainders are so distinct from the possession, that they may be granted as remainders, without affecting the particular estate."

'Lev. 36; Raym. 36; Sid. 83; Keb. 76, *Stephens v. Brittridge*.'

"But, where an estate is limited to A and B, and to the heirs of A, or (which is all one) to A and B for their lives, and after their deaths, to the right heirs of A, or to husband and wife, and the heirs of the body of the husband; or to two men, and the heirs of their bodies, or to the heirs of the body of one of them; these estates are, to some purposes, executed, and to others not, to continue as remainders. For, as to prevent the survivor from taking the whole, they are not executed; because the first words gave them a joint-estate for their lives, which shall go to the survivor; and this the limitation after shall not control. Yet they are so far executed in possession, that he who has the inheritance cannot grant it away as a remainder distinct from the possession. And in the case of the husband and wife, between whom there are no moieties, the inheritance is so executed in the husband, that if he makes a feoffment, this will be a discontinuance to his issue; but, if he suffers a common recovery with single voucher, this will bind neither the issue nor remainder; because his wife was seised of the whole jointly with him, and not partly, and there are no moieties between them; and therefore it cannot be good for any part: but the feoffment deals with the possession, and gives it away by solemn livery; and therefore to preserve the warranty, this amounts to a discontinuance, and the issue shall be put to his formedon in descender, and those in remainder to their formedon in remainder: and if the husband levies a fine, this will bind the issue by the statute of 4 H. 7, and 32 H. 8. But, whether this will be a discontinuance of the remainder or reversion seems doubtful. But, if the estate were to the husband and wife, and heirs to the body of the wife, there a fine levied by the husband would be no bar or discontinuance to the issue or those in remainder, because he had but an estate for life. But this belongs to another inquiry.

Co. Lit. 182, 183, 184; 2 Co. 61; Cro. Eliz. 470, 481; Poph. 52; Dy. 9, pl. 22; Cro. Car. 320; 3 Co. 5; Moor, 210; Yelv. 131; 1 Lev. 37; 1 Sid. 83;" ||*Fearne, C. R.* 376; 2 Black. R. 1211; 4 Barn. & A. 303.

"Copyhold land was surrendered to the use of the wife for life, remainder to the use of the right heirs of the husband and wife: it was the opinion of the justices, that the fee was executed for a moiety in the wife, and the

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husband thereof seised in her right; so that upon her death such moiety should go to her heirs, though the husband was then living. So, if a lease were made to A for life, remainder to the right heirs of A and B, this was executed for a moiety in A, and then for the other moiety, in both cases it must be contingent, and if the wife or A die first, will be void; for *non est hæres viventis*, and it cannot vest in the heirs of the husband or of B during their lives; and though there are no moieties between the husband and wife, yet, in this case, the inheritance may well execute in the wife for a moiety, because the wife takes the whole, and the husband nothing at all, and so the point of taking by moieties is out of the case. Also, the heirs of the wife, who are to take a moiety of the inheritance, need not be heirs of the husband too, as they must, where such remainder is limited to the heirs of the body of the husband and wife; for in that case it cannot be executed for a moiety, because it may happen that the heirs of her body cannot take after her death; as, if the husband survives, they cannot, because they are to be heirs of the body of the husband as well as of the wife; but in this case, immediately upon the death of the wife, the inheritance for a moiety may vest in her heirs. But, if an estate be made to the wife for life, remainder to the husband and wife and their heirs; or to A for life, remainder to A and B and their heirs, these remainders are not executed in the wife or in A for a moiety, but continue distinct as remainders: for otherwise where the remainder is a joint-tenancy in fee, and the survivor shall take the whole, if this should be executed in possession for a moiety, this would be against the intent of the deed, and exclude the benefit of the survivorship.

3 Leon. 4; 2 Roll. Abr. 417, pl. 6.

“If lands are given to a woman and the heirs of the body of her husband, who is then dead; it is said, that the wife and the issue of the husband are joint-tenants for life, with remainder to the issue in tail. For, since they are named to take in possession as the wife, and if they should take only an estate for life, the donor would have again the land, though there were still heirs of the body of the husband in being, which by the words and intent of the gift he ought not to have, since he has given it to the heirs of the body of the husband, and whoever answers that description is comprised within the words of the gift, therefore, they shall also have a remainder in tail.

2 Roll. Abr. 416, pl. 1, 2; 6 Co. 17.”

“Where one devised lands to A and his heirs, during the life of B, and after the death of B, to the heirs male of the body of the said B now living; it was adjudged in B. R., and affirmed in parliament against a judgment in the Exchequer Chamber, that C, who was the son and heir-apparent of B at the time of the devise, should take this remainder by purchase, as sufficiently described and intended by the will, and that it was not a contingent remainder to be void on the determination of the particular estate before the death of B; and it was held, that the words *now living* should refer to the heirs male, and not to B himself, though that was the next antecedent; because the deviser took notice before that he was living, and then to refer those words to him would be a vain tautology, and C was then heir apparent, and heir in common parlance.” “But, whether he should take for life only, or in tail, seems doubtful upon the whole case.”

‘Vent. 334; 2 Vent. 311; Raym. 330; 2 Jon. 99; 2 Lev. 232; James v. Richardson, or Burchett v. Durdant, Pollex, 457; 1 Br. P. C. 493.’ || Vide 2 Mer. R. 232.]

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^β When a contingent remainder is given to a class of individuals, or to a person or persons by description, and the contingency consists not merely in the uncertainty of the person or persons by whom the estate is to be taken, but in events disconnected with the person or persons to take, when the contingency happens the estate vests in the person or persons then comprehended in the class, or answering the description.

Den v. Crawford, 3 Halst. 90.*g*

A by his will in writing devised all his lands to B and C, and the survivor of them, for the term of twenty-one years, for the payment of his debts and legacies, and after payment the term to cease, and after the end or sooner determination of that estate he devised the premises to the first son of his body, and to the heirs male of the body of such first son lawfully issuing, and for default of such issue to B for ninety-nine years, if he so long live, without impeachment of waste, remainder to the first and other sons of B, and the heirs male of their bodies successively, remainder to C for ninety-nine years, if he so long live, remainder to his first and other sons in tail male successively, remainder to the heirs male of his aunt Mrs. Elizabeth Long, wife of Richard Long, clerk, lawfully begotten,^(a) and for default of such issue, the reversion and remainder to his own right heirs, and by his will gave 150*l.* annuity to Dorothy Beaumont his sister, the plaintiff in error, for life, and 500*l.* to her children, and to his aunt Elizabeth Long 100*l.*, and to her children 500*l.*, and died without issue. B and C entered by virtue of the devise for twenty-one years, and afterwards both died without issue; and John Beaumont and Dorothy his wife entered in right of Dorothy as heir at law to the testator, the term for twenty-one years being determined, and the debts and legacies paid; and Thomas Long, eldest son of Elizabeth (she having, at the time of making the said will, three sons, viz.: the said Thomas, and two others,) entered and brought an ejectment; and in the Exchequer judgment was given by Chief Baron Ward, Price, and Lovel, against Baron Bury, for the plaintiff Thomas Long. But in Trinity term, 1713, this judgment was reversed in error in the Exchequer Chamber. And now upon error brought in the House of Lords it was argued, that this reversal should be affirmed. First, because Dorothy being heir at law to the testator, her right, as such, was to be favoured; and all devises to disinherit an heir at law were to be taken strictly. Secondly, that to make this devise good to Thomas Long it must be construed either a contingent remainder, or the words *heirs male* be taken as a *descriptio personæ* to vest in him. As a contingent remainder it cannot be good for want of a freehold to support it; all the preceding estates being only four years; besides, if it were good as a contingent remainder in its creation, yet Elizabeth Long, the mother, being living when the particular estates determined, it cannot vest, because *non est hæres viventis*. As *descriptio personæ* it cannot vest, for that ought to be such a description as is *vice nominis*, which the words *heir male* (being a legal term, and not accompanied with any other words to determine the sense otherwise, as heir apparent, or heir now living, &c.,) cannot amount to, and the word *begotten* doth not determine the sense otherwise; nor does any intent appear to confine the devise to the issue male of Elizabeth Long, then much less to Thomas Long only, as the person described in this devise. But notwithstanding these reasons it was adjudged, that the first judgment should stand, and the judgment of reversal be reversed, though ten of the judges were of opinion

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that the devise was void, and only the three judges (Lovel being dead) before mentioned held it good.(b)

M. 1713, in *Domo Procerum*, Beaumont v. Long; 1 P. Wms. 229, S. C.; 1 Eq. Ca. Abr. 114, S. C.; 2 Eq. Ca. Abr. 331, S. C.; 1 Br. P. C. 489, S. C. [(a) *Begotten* and *to be begotten* generally bear the same construction. Vide Co. Lit. 20 b; 2 Vern. 545, 711; Pr. Ch. 491; 1 P. Wms. 427; 2 Ibid. 33; Fearn's C. R. 211, 7th ed.] || But if the words are "*in posterum procreandis*," sons born *before* shall be excluded on account of the peculiar force of *in posterum*. Co. Lit. 20 b, n. 3; and vide 1 Maule & S. 135. || (b) The court held, in this case, the word *heir* was used for *heir apparent*: That the testator had taken notice that his aunt E. L. was living, and that she had three sons; he could not, therefore, mean that the eldest son should take strictly as heir, but as heir apparent he might. Besides, he took notice of his own heir, and gave her an annuity out of the lands, which showed his intention that she should not have all the lands; and the limitation to his own right heirs was expressly in *default of issue male of the body* of his aunt E. L., so that it was plain that he intended the apparent heir male of E. L. should take before his own heir general, and that his own heir should not take whilst there was any issue of E. L. Mr. Fearn observes, that in this case the ancestor did not take the legal freehold. Pa. 212, (7th edit. by Butler.)

A testator after charging the lands with annuities to his wife, and after her decease to four of his five daughters, and another annuity to his fifth daughter M, for seventy years, if she and the testator's son R should so long jointly live, to commence at the expiration of the term of two years thereafter given in the premises to the said M, and the death of testator's wife; and after devising the premises to his said daughter M for two years after his decease, with remainder to his son R (if then living) for ninety years, if he so long lived; he devised the premises so subject to *R's heirs male*, and to the *heirs of his daughter M*, jointly and equally, and *their heirs and assigns for ever*. And for want of heirs male lawfully begotten of the said R at the time of his decease, he devised the premises to the *heirs and assigns of the said M, lawfully begotten of her body*, to hold to the heirs and assigns of the said M for ever. The son R, at the time of the will, had one son and two daughters; and the daughter M had then one son. On the testator's death M entered, and held the whole of the lands for the two years; when the son R entered and held them till his death, upon which, M entering, the son of R brought his ejectment. Upon the case being argued in the Court of C. B., De Grey, C. J., said, the question was, Whether there was a sufficient *designation* of the person to make the son of M take as her *heir*, living the mother? That two hundred years ago it might have been thought not sufficient, because the description was not legally and *technically* true. But that, within a century past, a more liberal construction of the words of a testator had prevailed; and they had been generally taken in their *popular* sense, which was most likely to have been his meaning. That in the principal case the intent of the testator was clear, that the same favour should be extended to the heirs of M, as to the heirs male of R; he took notice that M was *living* by leaving her a term, and a subsequent annuity; and meant a *present* interest should vest in her heir, that is, her *heir apparent* during *her life*; he therefore did not think the lessor of the plaintiff was entitled to more than one moiety of the premises.—The rest of the justices agreed in the same opinion, and the plaintiff had judgment as to one moiety only.

Goodright v. White, 2 Bl. R. 1010.] || On the three last cases Mr. Fearn observes, that the ancestor of none of them took the legal estate of freehold.||

|| So where A B devised land to trustees, to permit his daughter to receive the rents for her life; and from and after her death he devised the

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same "unto the heirs of the body of his daughter share and share alike, their heirs and assigns for ever;" and at the time of the testator's death the daughter had one child, and afterwards had eleven others; it was held, that the words "heirs of the body" in this will were not to be construed in their technical sense, but that they meant *children*, and consequently that the daughter's child born before the testator's death took a vested remainder in fee, subject to open and let in those who might be born afterwards.

Right v. Creber, 5 Barn. & C. 866; and see Gretton v. Haward, 6 Taunt. 94. || Thompson v. Garwood, 3 Whart. 287; Wells v. Ritter, Ibid. 208.g

β It is well settled that there are no technical appropriate words which always determine the extent of a devise; the same words have been determined differently, and the question is always a question of intention.

Finlay v. King's lessee, 3 Pet. 374; and see Carver v. Astor, 4 Pet. 1.g

J S having issue two sons, A and B, devises in the words following: "I give to my eldest son A all that my farm called Dumsey, to him and his heirs male for ever; if a female, my next heir shall allow and pay to her 200*l.* in money, or twelve pounds a year out of the rents and profits of Dumsey, and shall have all the rest to himself; I mean my next heir, to him and his heirs male for ever." Upon the death of the testator, A entered and died, leaving issue a daughter; and it was adjudged, that the lands should go to the second son B, and not to the daughter of the eldest, though she was heir general.

Ld. Raym. 185; Preced. Ch. 468, Baker v. Wall.

I S devised to trustees in trust, after debts and legacies paid, to convey to A his cousin and the heirs male of his body; and for want of such heirs male, then to the heirs male of the body of B, his great grandfather; and for want of such heirs male, to his own right heirs for ever, and gave to his sister 2000*l.* to be put out at interest during her life, she to receive the interest, and after her death to her children, and died, and soon after A died without issue; and C being heir male of B the testator's great grandfather, but not heir general, there being a daughter of an elder brother, the question was between him and the testator's sister and heir at law, who had the 2000*l.*, devised to her, whether the devise was void or not? And my Lord Chancellor held the devise good, and that C should take as a person sufficiently described and intended by the testator.

2 Vern. 729, Newcomen v. Barkham; Preced. Ch. 461, S. C. ||Vide Mr. Hargrave's learned note as to the doctrine that an heir special to take by purchase must also be heir general. Co. Lit. 246, n. 3; 164 a, n. 2. ||

But, where one seised in fee devised his lands to his grand-daughter (being his heir at law) for her life, remainder to his own right heirs male for ever, and died, leaving his grand-daughter his heir at law, and also leaving a deceased brother's son, who was the next of kin in the male line; it was held by Lord Macclesfield, that the nephew could not take, that the words *heirs male* must be intended heirs male of the body, and could never extend to an heir male of any collateral line; and it not being said in the will heir male of his body or of his name, the grand-daughter, who was his heir at law, might have an heir male, though not of his name. And he said that this case differed from that of Brown and Barkham,(a) that being merely a trust; also that in that case the remainder was limited to the heirs male of the body of Sir Robert Barkham, the grandfather;

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whereas here the devise was to the heirs male, without saying of any body.

2 P. Wms. 1, *Dawes v. Ferrers*. [This case was again brought before the Court in *Gwynne v. Cooke*, 18th Dec. 1740, when Lord Hardwicke directed a case for the opinion of the Court of K. B., (Reg. Lib. A. 1740, fo. 310,) who certified in confirmation of Lord Macclesfield's order, (Vin. Abr. tit. *Devise*, W. b, pl. 13, n.) and that certificate was afterwards confirmed, and the bill dismissed with costs. Reg. Lib. A. 1741, fol. 646. But in *Wills v. Palmer*, 5 Burr. 2615, on a case sent to the Court of K. B. by the Court of Chancery, the question arose on both a will and a deed, whether A took by purchase under the description of *heirs male of the body of B*, not being heir general, B being in the first case the *grantor*; the court certified, that A took an estate-tail by *descent*; but they added in the certificate, that if a *third person* had been the grantor, they should have thought that A would have taken by *purchase* as heir male of the body of B; and they also certified, that he did so take under the will. Cox's note, 2 P. Wms. 3.] (a) The case of *Newcomen and Barkham*, *suprà*. ¶Vide Goodtitle dem. *Weston v. Burtenshaw*, *Fearne*, C. R. (7th edit.) Append. No. I.¶

A seised of lands in fee by indenture, covenants to stand seised to the use of himself for life, remainder to Edward his eldest son for life, remainder to the first son of Edward in tail-male, remainder to the second, third, and fourth sons of Edward in tail-male, and so to all and every other the heirs male of the body of Edward respectively, and successively, and to the heirs male of their bodies according to their seniority of birth; remainder to the lessor of the plaintiff for life, and a proviso, that if Edward dies without issue male, that he shall have power to charge the lands with daughters' portions not exceeding 100*l.* a piece: the covenantor dies, and Edward suffers a common recovery, and dies without issue male: and the only question was, If Edward took an estate-tail subsequent to the limitation to his four sons in tail, or if he took only an estate for life, with a like remainder to all his other sons in tail-male successively, as was limited to the four first? It was adjudged, that he took but an estate for life, and that all his other sons should take by purchase. First, Because otherwise the words, *and to the heirs male of their bodies*, would be useless. Secondly, The words *and so, (a) &c.*, prove the same intent, which being turned into Latin are *eodem modo*. Thirdly, *Severally and successively according to their seniority*, are also a further proof of such intent. Fourthly, The power to provide portions for daughters would be unnecessary if Edward took an estate-tail, because then by a common recovery he might bar it, and charge the lands as he thought fit. (b)

2 Jon. 114; 2 Lev. 223; Raym. 278, *Lisle v. Gray*. (a)¶As to the effect of similar words of reference, vide *Meredith v. Meredith*, 10 East, 503.¶ (b) Judgment was given for the plaintiff: upon which a writ of error was brought in the Exchequer Chamber, where, it seems, the judgment was affirmed, as is observed by Judge Tracy, 1 P. Wms. 90, who, it appears, had searched the record, the reports differing in that matter. *Fearne*, 152, (7th edit.) by Butler. ¶Vide 2 Mer. 294.¶

‘A devises lands to B for life, and after his death to the next heir male of B, and the heirs male of the body of such next heir male; and it was adjudged a good remainder in contingency to the next heir male of B, being in the singular number, and so was only a description or designation of the person who should take the remainder after the death of B, and not any limitation of his estate.

Co. 66; 2 And. 37; Cro. Eliz. 453; *Archer's case* cited, Vent. 216; 3 Lev. 433, and in several other cases, which vide under title *Devise*.’

If one devises to A for life, remainder to B, and the heirs of his body, remainder to C and his wife for their lives, and after their death to their

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children, they then having children, C and his wife take only an estate for life, with remainders to their children for life, and no estate-tail; but had there been no children, the devise being immediate, the children could not take in remainder, and therefore it must be an entail in the husband and wife.

6 Co. 17, Wild's case. ||Vide 2 Bos. & Pul. 485; 4 Taunt. 313; 1 Ball. & Bea. 461.||

If lands are given to a woman and the heirs of the body of her husband who is then dead, it is said that the wife and the issue of the husband are joint-tenants for life, with remainder to the issue in tail; for since they are named to take in possession as the wife, if they should only take an estate for life, the donor would have again the land, though there were still heirs of the body of the husband in being, which by the words and intent of the gift he ought not to have, since he has given it to the heirs of the body of the husband; and whoever answers that description is comprised within the words of the gift.

2 Roll. Abr. 416; 6 Co. 17.

A devised lands to B for life, remainder to trustees to preserve contingent remainders during the life of B, remainder to the *heirs of the body* of B lawfully begotten; and Verney doubting whether this was an estate for life in B or tail, sent it as a case to B. R.; and notwithstanding the testator's plain intention to pass an estate for life, yet the court held, that where the ancestor takes an estate for life, and in the same instrument a limitation is made to his heirs, or to the heirs of his body, the heir cannot be a purchaser, and that therefore this was a plain estate-tail.

Hil. 13 G. 2, in B. R., Colson v. Colson; 2 Stra. 1125, S. C.; 2 Atk. 246, S. C.; Fearne, ||(7th edit.) 161; and vide *acc.* Hodgson v. Ambrose, Dougl. 337.||

"If A makes a feoffment in fee to the use of himself for life, remainder to the first son of his body begotten, and the heirs male of the body of such first son, and to the second, &c., in like manner; and for want of such issue, remainder to himself and the heirs of his body, with remainder to B in fee; in this case, till issue, A is tenant in tail general executed, with remainder to B in fee. But, if he had issue a son, then all his estate-tail opens and lets in the remainder to such son, and then he is become again tenant for life, remainder to such first son in tail-male, &c., remainder to himself in tail general, remainder to B in fee. And this arises upon the construction of the statute of uses; for before that statute the use being nothing else but the perception of the profits, and no estate in the land itself, was not subject to the same rules of law by which the land itself was governed, nor had the *cestui que use* any other remedy than by *sub-pœna* in Chancery, to compel the tenant of the land to let him into the perception of the profits, or convey the possession to him. And though that statute, by carrying the possession to the use, did in effect take away and destroy the use, for so much as was executed in possession, yet it still left in the parties the same power of limiting and appointing the uses as they had before. And when the person who was to take the use came *in esse*, the statute supplied the place of the Chancery, and carried the possession to the use, if nothing were done in the mean time to hinder the rising of the use; and though the estates were before united, yet by an act of parliament they may well be severed again to let in the intermediate use, since the statute executes the possession only according to the uses

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when they happen, as well as those that are capable of being executed presently. And therefore in that case, though the wife of the tenant in tail hath by the intermarriage title of dower, yet it is defeated again by the birth of a son, which turns the estate-tail to an estate for life by the terms of the settlement under which only the title of dower accrued, and therefore must be subject to be defeated by the terms of the same settlement.

Chudleigh's case, 16, 133; 11 Co. 82; Co. Lit. 28^a; 2 Saund. 382, 386, 387; Cro. Eliz. 345, *contr.*" ||Vide Gilbert U. & T. by Sugden, p. 127; Lewis *dem.* Ormond v. Walters, 6 East, 336; and for an abstract of a translation of Anderson's report of Chudleigh's case, see Gilb. U. & T. by Sugden, Append. 521, (3d ed.)||

|| In Chudleigh's case the contingent remainders to the sons were estates-tail, and therefore the subsequent remainder to the heirs of the body of the ancestor was not prevented from vesting. But where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested. As a devise to A for life without impeachment or waste; and if he have issue male, then to such issue male and his heirs for ever; and if he die without issue male, then to B and his heirs for ever. In that case the court held that the remainder to B and his heirs was not vested, because the precedent limitation to the issue of A was resolved to be a contingent fee; and they took the distinction above stated, that where the mesne estates limited are for life or in tail, the last remainder may, if it be to a person *in esse*, vest, but that no remainder after a limitation in fee can be vested. But although the limitation (a) to B and his heirs was not vested, yet it was a good remainder, notwithstanding that the preceding limitation was of a contingent fee; for although a fee cannot in conveyances at common law be mounted on a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives one for the other, and not to interfere, but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former if the former should fail of effect; and this sort of alternative limitation is quaintly termed a contingency with a double aspect.

Loddington v. Kime, 1 Salk. 224; 1 Ld. Raym. 203; Goodright v. Dunham, Doug. 251; Doe *dem.* Comberbach v. Perryn, 3 Term R. 484; Ives v. Legge, *Ibid.* 488, *in nota*; Doe d. Gilman v. Elsey, 4 East, 313; and vide Lethieullier v. Tracy, 3 Atk. R. 774. (a) Fearn, C. R. 373, (7th ed.); and vide Doe v. Holme, 3 Wils. 237; Doe v. Scudamore, 2 Bos. & P. 289; Crump v. Norwood, 7 Taunt. 362; vide Doe v. Fonnerau, Doug. 487, and note.||

'If one makes a lease to A for life, remainder to him who first comes to St. Paul's church, &c., this is a good remainder in abeyance or contingency, but can vest in none till he qualifies himself to take it by coming to St. Paul's church; nor can any one grant it away, though he should happen after to come there first.

Poph. 5; Moor, 104; Perk. sect. 56; Dav. 35.'

"If one makes a feoffment in fee to the use of himself and his wife, and to the heirs of the survivor of them, or to the heirs of such as die first; this is in the nature of a contingent remainder to the survivor, or who dies first, and after the contingency happened, the heirs shall be in by descent; but by a feoffment before it takes place, the remainder will be destroyed. But these contingent remainders cannot be granted over, because they are in no person to grant; therefore where a lease was made to the husband and wife for 21 years, remainder to the survivor of them for 40 years, and the

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husband granted away this remainder ; it was holden a void grant, though he survived, because till the contingency happened, he had nothing in him to grant, release, or surrender. So, if a lease be made for life, remainder to the right heir of J S who is then living, if the eldest son of J S grants this remainder, and then J S dies ; yet upon the determination of the particular estate the grantor may enter, because his grant was void, having nothing in him to grant. And in the case of the husband and wife, if lands are given to them, and to the heirs of the body of the survivor of them, and they both join in a lease for 21 years, observing all the circumstances requisite by 32 H. 8, yet this lease shall not bind the issue for the above reason.

Cro. Car. 102; Yelv. 85; Poph. 5; 10 Co. 51; Cro. Eliz. 580; 1 Leon. 245; Co. Lit. 378 b; 10 Co. 51.

“A lease was made to A, B, and C for their lives, remainder to the assigns of the survivor of them for 99 years. B was the survivor. It was holden that the 99 years was an interest vested in him, which he might well dispose of, as he thought fit, and not a bare power only of nominating one to take it. For *assigns* is a word proper for the limitation of a further interest to the same party, in case of a chattel, as heirs is for the inheritance, and yet both vest in the party himself; for assigns are either in fact or in law, as executors, &c.; and it appears before, that a remainder to his executors in such manner vests in the party himself; and so it does in case of such a limitation to his assigns, who, for want of an actual assignee, will be his executors.

Clerk v. Sydenham, Yelv. 85; Plowd. 288. Vide *suprà*.” [Where a copyhold was limited to the use of husband and wife for their natural lives, and the life of the longest liver of them, and from and after the decease of the survivor, to the right heirs of the survivor for ever; it was held, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor. Doe v. Wilson, 4 Barn. & A. 303.]

“One levies a fine to the use of himself for life, and after his death to the use of his two daughters till his son B should return from beyond sea, and should come to the age of twenty-one years, or die; and after such return and age of twenty-one years, or death, which should first happen, to the use of the said B, and the heirs of his body begotten: B returns from beyond sea: it was adjudged, that this was a good remainder, and should vest in him immediately upon his return, though he was not then twenty-one; for the last disjunctive *or* is to be applied to the whole sentence, and makes it disjunctive in all, and though his coming from beyond sea, or to twenty-one years, are uncertain, yet his death is certain; and therefore this remainder does not depend altogether upon uncertainties. And in this case it seems the heirs of his body shall not take by purchase, though his death had happened first, and so the remainder could not vest in himself; for the limitation being to him and the heirs of his body, whoever takes by virtue thereof must take as from him, and consequently will be in by descent, (a) and not by purchase.

Cro. Eliz. 269; Leon. 243; Co. Lit. 225; Ld. Voux's or Vaux's case, Fearn's C. R. 19, (7th edit.) Butler. (a) 1 Co. 99, Shelley's case.

“So, if one devises lands to A for life, *si tam diu sola vixerit*, and after her death or marriage, remainder over to another, this is a good remainder, because it is certain one of the two contingencies will happen. But, if one gives lands to A till B comes to twenty-one years of age, and when

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B comes to such age, then to remain over, this remainder is contingent, and uncertain whether it will ever vest; for if B dies before such age, the remainder is become void. So, where land is given to a woman so long as she shall remain sole, or to A till B comes from Rome to England, and after her marriage, on B's coming to England, then to remain to C in fee, these remainders are contingent, and uncertain whether they shall ever vest or not; for if the woman never marries, nor B comes to England, these remainders will not vest, but are become void. So, if lands are devised to one for life, and if the devisee be disturbed, that then the land shall remain over to another in fee, this creates no remainder till such disturbance; and if that never happens, the remainder fails likewise; for these remainders are not to arise but upon such acts done; and therefore if they fail, so does the remainder.

2 Leon. 82; 3 Leon. 182; 3 Co. 20; Dyer, 142.

'One levies a fine to the use of A and the heirs male of his body, till he or the heirs male of his body attempt to alien or sell, and then to the use of B, &c.: A dies without issue, and without any attempt, &c.: B will have no estate, for his remainder was not to begin but upon such attempt precedent, and that not happening, the remainder never takes place.' "And *vide infra*, that a remainder to commence after such attempt is repugnant and against law."

'Acton v. Hare, Poph. 97; 10 Co. 85.'

'A lease is made to A for life, remainder to B for life, and if B dies before A, that then the land shall remain to C for life, this is a good remainder, if the contingency happens, otherwise not; and in the meantime the estate continues in the lessor, and is not in abeyance, being expressly limited to go over, if such contingency happens; therefore, till it does happen, nothing is divested out of the lessor.

Plow. 23; 3 Co. 20; Raym. 144; Co. Lit. 378.'

"A, by indenture, covenants to levy a fine for the use of himself for life, and after his decease to the use of B his son, so long and until he attempt to alien, and then to the use of C, and the heirs male of his body during the life of B, and immediately after his decease, to the use of the first and other sons of B in tail-male successively, remainder to C in tail. It was objected, that no use vested in C till B attempted to alien, for the use of C, and all the limitations after, depend on B's attempt to alien. But it seemed to the court, that it should be intended in the limitation of the use, that after B's death without issue male, C should have the land, be there any attempt to alien or not, by reason of the words, *and immediately after his decease to the first son, &c.*; for the use which was to arise upon the attempt to alien is only restrained to the use for the life of B.

Holcroft's case, Moor, 486; Sir T. Raym. 429, S. C. cited." || See Fearn, C. R. 241, 242.||

"If one devise land to A and the heirs of his body, provided that if A happen to die without heirs of his body, that then it shall remain to B, this is a good remainder vested presently, and no contingency at all, but the ordinary limitation of a remainder upon an estate-tail. So, in a lease for life, upon condition that if the lessee die, then it shall remain, &c., this is a good remainder executed presently.

Hob. 30, 31; 1 Br. Abr. 155, pl. 85; Plowd. 25 a." β Barnitz's Lessee v. Casey, 7 Cranch, 370; Lippett v. Hopkins, 1 Gallis. 454; Arnold v. Buffum, 2 Mason, 208.g

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‘One devises lands to his wife during her natural life, if she does not marry; but if she marries, then presently after my son A to enter and enjoy, to him and the heirs male of his body; it was adjudged, first, That by this will, the wife had an estate for her widowhood only; secondly, That this was a remainder vested in A presently to take effect in possession upon the death or marriage of the wife, which should first happen, and not a contingent remainder to take effect only in case the wife married.

Luxford v. Cheeke, 3 Lev. 125; Sir T. Raym. 427, S. C. by the name of Brown v. Cutter, 3 Leon. 182.’ [In Lady Anne Fry’s case, 1 Ventr. 203, Hale expressed a similar opinion; where he said, it is all one as if the estate had been devised to her for life, and if she marries then to remain, which had been but an estate *quam diu sola vixerit*.—In a case where a testator devised lands to his wife during her widowhood, and if she should marry again, that then his daughter should enter; provided that if his wife married and survived his daughter, the estate should return to her; Lord Hardwicke took a distinction between the devise of an estate during widowhood, with remainder over, and a devise during widowhood, with remainder over on her marrying again within a limited time. Jordan v. Holkham, Ambl. 209. Where there was a devise to a wife provided she remained a widow; but in case she married a second husband, then to a testator’s nephew when he should attain the age of twenty-three years; it was held, that the widow had an estate *till* the nephew attained the age of twenty-three years, though she married before. Doe v. Freeman, 1 Term R. 389.] || A devise over, in the event of a widow or daughter’s marrying a Scotchman, has been held valid. Perrin v. Lyon, 9 East, R. 170; and see Fearn’s C. R. 7, *in notâ*, (7th ed.) || β A by his will gave all the income of his estate to his wife during widowhood, to be equally divided between her and his son, but if she married then he gave the direction of his son’s education to B; he afterwards devised a portion of his estate to his son specifically, and died, leaving his wife, (who afterwards intermarried,) his son, and a grand-daughter, the child of a deceased son. Held that he died intestate as to all not specifically devised to his son, that the widow had no interest in it after the termination of her widowhood, and that the grand-daughter was entitled to a moiety. Lessee of Pryor v. Dunkle, 2 Wash. C. C. R. 416. But see M’Ilvaine v. Gethan, 3 Wharton, 575.*g*

‘One devises lands in this manner; My will is, to entail all my lands to my nephew A, and the heirs male of his body, and for default of such issue, to his brother, and the heirs male of his body, &c., *habendum* to them severally, and to the heirs male of their bodies, to the only intent and true meaning of this my will, and so long as they and every of them do perform and keep the true meaning thereof touching the entailing all my said lands to A, and the heirs male of his body begotten, until he or they make any acts to alter or discontinue the estate-tail, and then to B, and the heirs male of his body, with other remainders over, and dies: A enters; B dies, leaving issue C, and then A levies a fine; and it was objected that C could not enter, because the remainder devised to his father was contingent, and not to arise but upon A’s alteration of the estate, and not before or otherwise, and then B dying before that contingency happened, the remainder could not vest. But it was adjudged, that the remainder to B was not contingent, but an immediate devise, and that otherwise the intent of the deviser, which was to give to every one in remainder successively, would be destroyed, though it was holden that the limitation over upon his alienation did not so defeat the operation of the fine, as to prevent the discontinuance wrought thereby, and give him in remainder immediate title of entry thereby; for that such clause tended to a perpetuity, and was condemned in law upon the reason of other cases there cited.

Foy v. Hinde, Cro. Ja. 696; Jon. 57; Raym. 429.’ || Fearn, C. R. (7th ed.) 256. Vide, as to the repugnancy and invalidity of restraints on alienation by tenants in tail, Litt. s. 720, Fearn’s C. R. 257, note 4, and *infra*.]

“A, in consideration of a marriage intended between B his nephew,

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and C the daughter of D, and of 200 marks paid by D, makes a feoffment to the use of B and C for their lives, and after carnal copulation to the use of the issues of their bodies, remainder to B and the heirs of his body begotten, &c. The marriage never takes effect, but B marries another woman, and hath issue by her; and A married also, and had issue; and after the death of A and B the question between their children was, 1st, If the use should arise to B and C for their lives by reason of the money paid, though no marriage was had? 2d, If the remainders which were limited after the marriage are not now prevented from rising, by reason no marriage was had? As to the first, the justices thought, the use would well arise, though no marriage was had; because it was limited out of the estate of the feoffees, which was an estate executed, and needed no consideration to raise the use. But if it had been by way of covenant to stand seised, they held, no use would arise; because the marriage was the principal consideration, and that failing, the consideration to raise the use fails likewise, and the money would not be sufficient. As to the second point, they thought the consideration of name and blood sufficient to raise a use to B, who was A's nephew, and that it might be independent on the other limitations, which were not to arise but upon the marriage had. But no judgment was given.

Moor, 101, pl. 247; Dy. 334 b, Calthrop's case."

'Lands were settled to the use of the husband and wife for their joint lives, and after the death of either of them, to the heirs of the body of the wife by the husband to be begotten, and for default of such issue, the wife surviving the husband, to the use of the wife for life, and after her death to the heirs of her body begotten; the husband dies leaving issue by the wife, and she marries again, and suffers a common recovery; and the principal question was, Whether this was an estate-tail executed in the wife, or that the remainder was contingent? It was argued, that the remainder depending on their joint lives, and being limited to the heirs of the body of one of them, so that it may be frustrate, if the wife survives, must needs be contingent; because by the death of the husband the joint estate for life is determined, and yet the remainder to the heirs of the body of the wife by the husband cannot take effect, for *non est hæres viventis*. But *per cur.* clearly, and with some displeasure at the argument, the words *heirs, &c.*, are not words of purchase, but of limitation to the wife, and the estate vests in her presently, and is not in contingency; as if an estate be limited to a woman *durante viduitate*, remainder to her heirs or the heirs of her body, this is a fee-simple or fee-tail executed in her presently; and though she afterwards marries, yet that shall not destroy the estate that was well vested and settled in her before; and here the remainder closes with the particular estate to all purposes but dividing the joint-tenancy, and is no more than an estate to the husband and wife, and the heirs of the body of the wife.' "And they seemed to rely upon the case in Perkins, where lands were leased to A and B for the life of C, remainder to the right heirs of A; then C died, living A and B, and after A takes wife and died, living B. It is there said, that the wife of A shall be endowed, because C died, living A the husband, so that the freehold and inheritance were united in the husband during the coverture. Which case, if it be law, may give some colour to the principal case. But it seems to me not to be law; for the rule is, that where by possibility the particular estate may determine before

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the remainder can take effect, there such remainder is contingent; and by the death of C the particular estate is absolutely determined, for the remainder cannot then take effect, because A cannot have heirs during his life. And this is no infringement of the other rule, that wherever the ancestor takes an estate for life, and after in the same conveyance a limitation is made to his right heirs, or the heirs of his body mediately or immediately, that in such case the remainder vests in the ancestor himself, and by consequence the heirs shall be in by descent, and not by purchase; for here, A took no estate for his own life; and though it was an estate of freehold, yet it was so limited, that without any act or default of his it might determine during his life; and since the life of C was made the measure of the continuance of the estate of A and B, it is more reasonable to give it A after C's death, than it is to give it B likewise: but both their estates are to be bounded and circumscribed by the life of C, and when he dies, living A, who can then have no heir to take the remainder, it seems in reason, the remainder is destroyed. So, in the principal case, when the estate is limited to the husband and wife during *their joint lives*, this is no absolute estate for their lives so as to go to the survivor, but the death of either of them determines that estate, and the remainder being limited to the heirs of the body of the wife who survived, and can have no heir during her life, seems to be defeated thereby. And note, they seemed to agree, that if an estate were made to the husband and wife *during coverture*, remainder to the heirs, or heirs of the body of the husband, that this was a contingent remainder. And there seems no difference in reason between such a limitation, and where it is *durante viduitate*, or to two for their joint lives, or to two during the life of a third person, with such remainder over; because in all those cases the particular estate determines before the remainder can take effect. And the case in 2 Ro. Abr. 418, *supra*, seems expressly to contradict the principal case, and the reason of it. So the case *supra*. But in the principal case, if the wife had died first, there had been no doubt but the heirs of her body had taken by descent, she having had the whole during her life. And this seems to differ much from a limitation to baron and feme, and the heirs of the body of the feme; for there, whichever of them dies first, yet the survivor shall hold during life. *Ideo quære* of these matters. As to the second point of the case, if the second limitation to the wife should take effect, because it was upon the dying without such issue, whereas there was issue so begotten living at the death of the husband; the court said there was no colour for it, for such heir and such issue is all one, for unless in the heir, it is not such issue. Note, this objection seems to make the second remainder to the wife conditional upon the husband's not leaving issue at the time of his death, which here he did. But the limitation is not confined to his leaving issue at the time of his death, but is general, *and for default of such issue* or heir, and seems not to differ from the common limitation of remainders after estates-tail, and therefore may well vest as a remainder in the wife immediately upon the husband's death."

'Sid. 247; Raym. 126; Keb. 888, Merrell v. Rumsey; and vide Perk. s. 337; 5 Co. 9; 2 Roll. Abr. 418;' "Perk. s. 337; 5 Co. 9; 1 Sid. 247." || See Fearne's C. R. 32, (7th ed.,) Butler, where the doctrine of the principal case, (Perkins, 337) is vindicated, and Rolle's distinctions are controverted; and Mr. Fearne thinks it the better conclusion, that the possibility of the freehold determining in the life of the ancestor who takes it, does not keep the subsequent limitation to heirs from attaching in the ancestor himself. || β See Carver v. Astor, 4 Pet. 1. An estate is contingent although

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limited to a person *ascertained* by name, if limited on a condition, as that he should be living at the death of the tenant for life. *Dunwoodie v. Reed*, 3 Serg. & R. 440. Devise to A and B, their heirs and assigns, "Provided always, that if both my said grandchildren shall happen to die under age and without lawful issue," then remainder over; they both attained full age and died without issue, held that the remainders over could only take place on the happening of both contingencies. *Cheeseman v. Wilt*, 1 Yeates, 411; *Griffith v. Woodward*, *Ibid.* 316; *Holmes v. Holmes*, 5 Binney, 252 g

"One makes a feoffment in fee to the use of himself for life, and after to the use of such person and persons to whom he shall demise any part of the premises for life or years, and after for the performance of his last will, and to the use of such person and persons to whom he shall by his last will devise any estate or estates, and after to the use of B in tail, with other remainders over. These remainders are contingent, and not executed in B and the others till the death of the feoffor, because the feoffor hath such power that by his will he may give away the whole fee-simple, and therefore, till his death it being uncertain whether they will ever vest or not, they must needs be contingent, and then the use of the fee in the mean time vests again in the feoffor. But *quære* in this case, if he afterwards makes a feoffment in fee, or commits a forfeiture, if those in remainder may not enter presently: for such feoffment is not in pursuance of his power; and if it be not warranted by that, it cannot be good at all. For if it should, he might then derogate from his own grant, and avoid it in what manner he pleased. And if it be so, that those in remainder may enter in such case, then their remainder must be vested in them before, and cannot be contingent; for the feoffment which gives away the whole estate to another, can never operate so as to vest in them at the same time too. Besides, the account given of these remainders is inconsistent with their being in contingency; for all contingent remainders pass out of the feoffor at the same time with the particular estate, and are carried into abeyance till the contingency happens; but here it is said the use of the fee is vested in the feoffor till his death, which cannot be; therefore, it seems more reasonable to construe these remainders to be vested presently, though subject to be divested and taken out of them by the feoffor, if he pursues his power in devising away the whole. But if he makes such feoffment, it should seem he can never after execute his power, for that was inclusively given away and extinguished in the feoffment, whether those in remainder may enter for the forfeiture or not; and if they cannot, then their estates are absolutely in the power of the feoffor, and his reserving to himself a power to defeat them in such a particular manner was altogether idle, which seems not reasonable.

10 Co. 85, *Leonard Lovie's case*;" || *Walpole v. Conway*, *Barnard. C. R.* 153, *acc.*||

|| The cases above in the margin are now overruled, and the law is settled according to the doctrine suggested in the *quære* by C. B. Gilbert, viz., that where there is a limitation for life to the ancestor, remainder to such uses as he shall appoint, and in default of appointment remainders over, the power of appointment does not suspend the vesting of the subsequent remainder; but the estates vest, subject only to be divested, in part or in whole, by the exercise of the power of appointment; if the appointment is not made, they remain undisturbed.

Cunningham v. Moody, 1 Ves. sen. 174; *Doe dem. Willis v. Martin*, 4 Term R. 39; *Maundrell v. Maundrell*, 7 Ves. 567; 10 Ves. 246; *Sugden on Powers*, c. 2 and 4; and vide *Fearne*, C. R. 226, (7th edit.,) where this doctrine is learnedly shown not to be inconsistent with the doctrine of *Loddington v. Kline*, *supra*, p. 330. ||

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β In a will after limitations for life, with remainder in tail, testatrix devised that "in default of such issue, to such person as *shall* be the nearest of blood;" held, that no particular time being expressed when the remainder was to vest, the general rule must prevail, and that it vested in interest immediately on the death of the testatrix.

Stert v. Platel, 5 Bing. N. S. 434.

Where testator devised lands to his wife during widowhood, remainder to his nephew for life, remainder to the children of the nephew as tenants in common, and if no child of his nephew at the death or marriage of his widow, then over; by a codicil he directed that neither his nephew, nor any of his children, should take a vested interest, unless they should attain 21, and in case any of them should die under that age, their shares should go to the survivors on attaining that age: held, that the interest of the children were contingent on attaining that age.

Russel v. Buchanan, 7 Sim. 628. See 2 Cr. & Mees. 561.g

(D) Of Remainders in Abeyance or Contingency; what Estate is sufficient to support them; when they are to take Effect; and by what Means they may be destroyed or prevented from coming *in esse*; and therein, of Remainders by way of executory Devise or future interest.

"A CONTINGENT remainder must vest during the particular estate, because if remote contingencies should be allowed to hang over titles, no man would know when he was safe in his purchases. The law, therefore, has appointed how long such contingencies are to expect, which is only during the continuance of the particular estate, and then the remainder must come in being; since remainder *ex vi termini* signifies a remaining part of a particular estate preceding. Whether such particular estate determine by effluxion of time, or by merger of the particular estate in a greater, it is all one; for if the contingent remainder do not vest before such merger, it can have no being afterwards; since the particular estate is the sole limitation on which the remainder is to take place.

"Contingent remainders arise either at common law, or by way of use, and are also to be destroyed two ways: first, by the merger of the particular estate which supports them; for the particular estate being, as hath been said, the sole time of limitation in which these contingencies are to take place, the merger of that estate is the destruction of the remainders; and this, whether such remainders be limited at common law or by way of use. But then every particular estate upon which such remainders depend must be taken away; for the remainder is the remaining part of each particular estate, when there are more than one in the limitation; and each particular estate is the time appointed by law when such contingent remainders are to take place; and therefore the destroying of one of these particular estates is no destruction of the remainder. Hence it is, that if an estate be limited to A for life, remainder to B for life, with contingent remainders over; if A makes a feoffment, this does not destroy the contingent remainder, because B hath a right to enter and re-continue his estate, which therefore in judgment of law subsists in him; and therefore that estate is not gone within the compass of which the contingent remainder is to vest. So it is, if B had only a right of action; (a) as if a descent had been cast upon the heir of the feoffee of A, and put B to his real action; because he who hath the right to the estate, hath, by the better opinion, in judgment of law, the estate in him.

2 Roll. Abr. 796; *Wegg v. Villers*, 1 Vent. 188." ||(a) But in *Thomson v. Leach*,

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12 Mod. 173, and Fearn, C. R. 287, (7th ed.,) it is expressly laid down that a right of *action* is not sufficient to support a contingent remainder, although a right of entry is so; for the estate is determined when it is turned to a mere right of *action*.||

"Secondly, such contingent remainder arising by way of use, may be also destroyed by taking away the seisin out of which the use ariseth. For the statute of the 27 H. 8 hath executed the seisin of the feoffee to the uses limited; so that if there be no seisin at the time when the use is to take place, such use must be destroyed, because no seisin or possession can be executed to it; and therefore, if the person in whom the legal seisin is made a feoffment for value without notice, such feoffee comes into a good title at law, and there is no reason in equity to take it from him; and by consequence, in such cases, the seisin out of which the use ariseth is destroyed. And therefore, if a man covenants to stand seised to the use of himself and his heirs, till an intended marriage of his son takes effect; and after the marriage, to the use of his son for his life, remainder to his wife for her life, with contingent remainders to the issue of the marriage, the father makes a feoffment in fee for value, without notice of the uses before such marriage, such uses are destroyed; and though the marriage takes effect, they can never arise, because the seisin out of which the uses were to arise is destroyed. Otherwise it is, if the feoffment had been without value, or with notice; because such feoffees had only acquired a seisin, which equity would make liable to the uses as a mere substitute of the feoffor. The same law of a lease for years, reserving rent for the time of the continuance of such lease; because such lease is valuable. Otherwise, of a lease for years, reserving no rent, because for no valuable consideration.

"If a man makes a feoffment to J S, to the use of himself for life, remainder to his daughter on her marriage for her life, remainder to her first son, remainder to his own right heirs; if he makes a feoffment in fee, or grants the reversion without value, that will not displace the contingent remainders, because the feoffee comes in as a volunteer, and therefore shall not disturb a valuable settlement. But, if such feoffor and J S join in a feoffment for value without notice, it will destroy the remainders for the former reason. But, if he himself makes a feoffment for value without J S, such contingent remainders, by the better opinion, will arise out of the first livery to J S, if they happen within the life of the daughter, which is called the *scintilla juris* in J S, to be executed to the contingent uses. The reason of which is, that since there is a particular estate still continuing in the daughter, within the compass of which the contingent remainders may still vest; and since before the statute there was a seisin continuing in the feoffee, and the intention of the statute was to preserve and not to destroy the estate; therefore, in support of the statute, the law rather will suppose a seisin in feoffees to be executed to the contingent uses, if they happen within time, than suffer such contingent uses to be destroyed by limitations subsequent to them.

2 Roll. Abr. 796, *Wegg v. Villers*." ||Vide Fearn's C. R. (7th ed.) 287, 296.||

"Let us in the next place see by what means these contingent remainders may be destroyed or prevented from ever arising." "And here the rule is, that if the contingent remainder cannot vest either during the particular estate, or at the instant of the determination thereof, such remainder is for ever destroyed. The reason whereof seems to be, to prevent the inconvenience and danger that might otherwise ensue to purchasers by allow-

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ing such remainders to take place wherever they happened; for if but the latitude of a day were given to their vesting, after the particular estate ended, they might as well arise one hundred years after, the reason of such allowance being the same; and since by the limitation they ought to vest when the particular estate determines, if they cannot so do they shall never after take effect, be they limited either at common law or by way of use.

Co. 134, 138; Poph. 82.'

β A contingent remainder may take effect in some and not in all the persons to whom it is limited, according as some may come in being before the termination of the particular estate, and others not, and they take jointly notwithstanding the difference of time.

Wager v. Wager, 1 Serg. & R. 374.g

'Therefore, where one made a feoffment in fee to the use of himself for life, and after to the use of his first son and his heirs; the father and feoffees, before any issue, enfeoffed I S and his heirs, for a valuable consideration, without notice, and then the father died leaving issue a son who enters; by the better opinion, the contingent use to the son was destroyed; because by the feoffment the particular estate was determined, and the son not being *in esse* to take advantage of the forfeiture and wrong done to his remainder, shall never after set it up against the purchaser; and the feoffees, by their joining in the feoffment, have excluded themselves of any entry to revive the remainder, if that were necessary, as a release by them after the feoffment of the father would likewise have done.(a)

2 Leon. 178. (a) 2 Roll. Abr. 797.'

"One made a feoffment in fee to the use of himself for life, remainder to the use of his eldest son in tail, remainder to his own right heirs, and before issue, suffered a recovery, and died leaving a son. It was holden, that in this case the son should not avoid the recovery by 32 H. 8; because the remainder was not in him at the time of the recovery, as by the words of the statute it ought to be. But it was holden, that he might avoid the recovery by the common law; because, says the book, the recompense could not extend to such remainder as was not *in esse* at that time. But this is against the express resolution of the cases after mentioned; for a common recovery is now but a common assurance, and therefore if tenant in tail, remainder to the right heirs of J S, suffers a common recovery, living J S, yet the remainder is barred, though it was then in abeyance, and the recompense in value could not extend to it.

2 Leon. 224; 1 Co. 136 a; 6 Co. 42 a; 2 Roll. R. 217; Poph. 139, Copwood's case; 1 Leon. 260, *contra per* Wray."

'A had issue B and C his sons, and made a feoffment in fee to the use of himself for life, and after to the use of the feoffees and their heirs during the life of B, remainder to the use of the first, second, and other sons of B in tail-male, remainder to the use of C and the heirs of his body, remainder to his own right heirs, and dies; the feoffees enfeoffed B in fee, without consideration, and with notice of the first uses, and after B hath issue a son, and if he was barred by the feoffment of the feoffees, was the question? It was adjudged, upon solemn argument in the Exchequer Chamber, that he was barred; for the feoffment of the feoffees divested all the estates and future uses, and though B had notice this was not material, the estate out of which the uses were to arise being divested and gone;

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and the new estate given by the second feoffment shall not be subject to the uses limited by the first feoffment; and there being no son of B to enter when the particular estate determined, as in this case it did by the feoffment, which was a forfeiture thereof, he shall never enter after; for the statute 27 H. 8, c. 10, executes no uses but when the estate continues in the feoffees to serve them, and not when that is divested, and the use itself turned to a right. Also it was held in the same case, that if there had been no alteration of the possession, but that B had died before the birth of his son, he should never after have the estate, the remainder to C being then executed, and the son of B born out of due time.^(a) And they agreed that the preserving such contingent uses would create perpetuities, and tend to the destruction of families, who, upon no occasion whatever, could dispose of their estates.

Co. 120; Poph. 70, Chudleigh's case. ¶ See various observations on and arguments drawn from Chudleigh's case, in Fearn, 300, 301, (7th ed.,) where Mr. Fearn controverts the notion of the necessity of an *actual* entry to revest contingent uses, which have been divested; and vide Butler's note, Ibid. 291, *et infra*. ¶ ^(a) Vide stat. 10 & 11 W. 3, c. 16, *post*, 349.

‘A tenant for life, remainder to his first, second, and other sons in tail-male successively, remainder to B for life, and so to his first, second, and other sons in tail-male; then B having issue a son, and A no son, A cuts timber trees; the son of B, who is then tenant in tail, shall have them, for the property thereof is in him by reason of his inheritance, and the remainder to the first and other sons of A is no impediment, being but a possibility, which may never happen, and is of no regard till it does happen, but may be destroyed by feoffment, &c.^(b)

Roll. Abr. 119, Uvedal v. Uvedal. ^(b) It is proper to observe, that Chancery will not admit of waste by collusion between tenant for life and the person entitled to the first vested estate of inheritance to the prejudice of sons not *in esse*. See the case of Garth and Sir John Hind Cotton, 1 Ves. 524, 546.

‘One made a feoffment in fee to the use of himself and his wife, and to the heirs of the survivors of them, and after the husband made a feoffment in fee, and died; the wife entered, and enfeoffed a stranger, and died; and the question was, Whether by the wife's entry the fee should vest in her, being the survivor, so as her issue might enjoy it? It was adjudged, that the husband's feoffment had destroyed this future contingent use of the fee; for whatever cannot accrue at the time of the death of the party who first dies, cannot afterwards, by any act, be revived; and though in this case the wife had a joint estate for life with her husband, yet, during the coverture, she was bound by his feoffment, and so could not prevent the destruction of the contingent fee, which was not to take effect till the death of one of them.^(c)

Cro. Car. 162; Biggot v. Smith, 3 Mod. 309; S. C. cited, Ld. Raym. 316; S. C. cited, Vent. 189; ¶ and vide Corbet v. Tichbourne, 2 Salk. 576, which is, however, distinguishable.] ^(c) In this case the particular estate was not subsisting at the husband's death, when the fee should have vested, for his second feoffment had destroyed it during the coverture; and though the wife's right of entry took effect at the instant the remainder should have vested, yet it was insufficient, for it should have been then actually existing. Fearn, 289, (7th edit.)

‘So, where one hath issue two sons, B and C, and makes a feoffment in fee to the use of himself for life, remainder to the use of C for life, remainder to the first son of C who should have issue of his body, and to his heirs for ever; and, for default of such issue, to the use of the first daugh-

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ter of C who should have issue of her body, and to her heirs for ever; and so to the second, &c., remainder to the right heirs of C for ever, and dies; C enters, and hath issue a son, who dies without issue; and then after C levies a fine with proclamation, and B enters as for a forfeiture of his estate for life; it was adjudged against B, for the fee vested presently in C, and the other limitations were but contingent, and so barred and destroyed by the fine, there being then none *in esse* to take them, and then the fee was immediate to his estate for life, and so the fine good, and no forfeiture.

Cro. Car. 364, Boreton v. Nicholls.

‘If one make a feoffment in fee, or covenant to stand seised to the use of himself for life, and after to the use of his first son in tail-male, &c., and before the birth of any son, make a feoffment in fee, this destroys the contingent remainder to the son, so that it can never after arise.

Cro. Ja. 168, Bell’s case cited.

‘One made a feoffment in fee to the use of himself for life, remainder to the use of his wife for life, remainder to A his eldest son for life, remainder to the eldest issue of A which should be at the time of his death, remainder to C in fee; A hath issue B his eldest son; the feoffor dies; his wife releases to A for years, and he makes a feoffment in fee to D, to whom C levies a fine; the wife dies, then A dies; it was adjudged that, by this feoffment, the remainder to the eldest son of A which should be at the time of his death was destroyed, though he had then a son actually born; because it was contingent and uncertain whether that son would continue to be his eldest at the time of his death; for he might die, and another be his eldest; and therefore the remainder could not vest in him in his father’s life, and by consequence being in contingency was destroyed by the feoffment, which determined the particular estate before the remainder could take place. But note, if the wife had entered, this had revived the contingent remainder, for her right of entry was sufficient for that purpose; or if she had survived A then, though she had died before entry, yet might the feoffees, after her death, enter and revive the contingent remainder.

Cro. Eliz. 630; Moor, pl. 726; Smith v. Belay, Lit. R. 291, like case; 2 Roll. Abr. 794.

‘A makes a lease for life by indenture, with livery to B, and if it fortune B to marry any wife who shall survive him, then the land shall remain to such wife for her life; *proviso* if B does not in writing, or last will, declare his mind that she shall have it, then it shall not remain to her; B before marriage makes a feoffment to C, to whom A levies a fine, and suffers a recovery, and after B marries, and makes a declaration that his wife shall have the remainder, &c.; then he and his wife levy a fine to C, and after he makes another like declaration and dies; and his wife enters. And by certificate of two judges to the Chancellor, her remainder was destroyed by the feoffment, because the freehold was thereby determined before the remainder could take effect; also the possibility of the wife was inclusively given away in the fine, and then the declaration was to no purpose. And so it seems it would have been if he had made such declaration, and after had made the feoffment, for that declaration had only made the remainder absolute to the wife who should survive him, which being contingent, and uncertain who that would be, would be barred and destroyed by the feoffment.

Moor, pl. 750, Powle v. Veer.’

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"*A cestui que use* in fee, 1 H. 8, devises, that his feoffees shall be seised to the use of B his son for life, remainder to the next heir of the body of B and C his wife for life, remainder to the next heir of the said heir begotten, and for default of such issue to the use of the heirs of the body of B and C his wife for the life and lives of every such heir or heirs, and for default of such heirs, to the use of the heirs of the body of B, remainder to the right heirs of B; and if any one of the said heirs shall let, set, alien, or mortgage his right, title, or interest, or suffer any recovery to be had against him by his consent, &c., that then the use limited to such heir shall be void during his life, and the feoffees shall thenceforth be seised to the use of the heir apparent of such offender, as if he were dead. A dies; B hath issue by C a son named D, and dies, in 31 H. 8. C dies; D enters, and hath issue two sons, E and F; then D, 4 Eliz., by indenture and fine conveys to the defendant with warranty, and afterwards, 6 Eliz., E levies a fine to him with warranty likewise. Afterwards E hath two sons, who are now living. The heir of the survivor of the feoffees within five years after the full age of F, and seven years after the fine levied, enters to revive the use limited to F who enters, and lets to the plaintiff. And by Geoffries, J., B had an estate-tail, because the estates are limited to go in a course of descent from heir to heir of his body. But by Gawdy and Southcote, J., every issue of B and C hath estate for life successively, with a remainder in tail expectant, as heirs of the body of B, and such remainder in tail shall not be executed in possession by reason of the mesne remainders for life limited to the heirs of the body of B and C for their lives, which, though they are but contingent, shall hinder the closing of the estate for life, with the remainder in tail in possession. But by Wray, C. J., and, as it seems, the better opinion, B and C have but estates for life by express limitation; but the remainder to the heirs of the body of B which is an estate-tail, closes with their estates for life, and gives them an estate-tail in possession, subject to open and let in the contingent remainders to the heirs of the body of B and C for their lives respectively; then D by his fine severs his two estates, forfeits his estate for life, and lets in E his heir apparent for his life, and E by his fine lets in F his then heir apparent by purchase, which the sons of E born after shall not divest. But by Geoffries, J., E being in by forfeiture of D his father, his estate shall not be again subject to the forfeiture by his alienation; or, if it be, yet F can have no more than E had at the time of the forfeiture, which was but during the life of D his father, and not the inheritance in tail, for that continued in D subject to no forfeiture. As to the regress of the feoffees, Geoffries, J., held that F taking in his turn as heir of the body of B and C which was contingent, they ought to enter to revive the use to him, but that their entry by fine and nonclaim was barred. Southcote, J., thought they could not enter at all, because the statute takes out all the right from them, but that F might enter, and was not bound to the five years, having no right at the time of the fine levied, his right coming by the fine of E as the *causa causans*. But Wray was clear, that no estate was left in the feoffees to warrant their entry; but that the contingent uses, when they happen, should vest without such entry: then, when D levied a fine, he gave an estate of inheritance to the defendant, having the entail and fee annexed to his estate for life, and E by his entry could gain only an estate for life as next heir apparent according to the will, and by his fine he could give only that estate for life, and so by the fine of D the right of the entail

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and fee were clearly barred and gone; and by the fine of E his estate for life was gone; and so F, to whom no estate was specially limited, but who was to take only as heir apparent to E, had no cause to enter. *Quære* of this case.

1 Leon. 256, Manning v. Andrews. Vide 1 Co. 138; Mo. 371, that such limitations of perpetual freehold are against law and void; because thereby lords would lose their wardships, escheats, &c. *Ideo quære.*" || And vide Litt. s. 720, Fearne, C. R. 257, note iv. Vide acc. Fearne, C. R. 300, 301, (7th ed.)||

'One devised lands to A for life, and after to the next heir male of A and the heirs male of the body of such next heir; A having issue B his son, made a feoffment in fee to C upon whom B entered: it was adjudged, first, that this was good as a contingent remainder; secondly, that by this feoffment of A, who was but tenant for life, the contingent remainder was destroyed, for every remainder ought to vest either during the particular estate, or at least *eo instanti* that the particular estate determines; and here by the feoffment the estate for life of A was determined by forfeiture; and since the remainder could not then take effect, for *non est hæres viventis*, it can never after rise.

Co. 66; Cro. Eliz. 453; Hob. 338; and vide 2 Leon. 219; Moor, 104; 2 Sid. 67.' ||Vide Blackburn v. Stables, 2 Ves. & B. 371.||

"So it is, if a lease be made to A for life, remainder to the right heirs of J S, if A makes a feoffment living J S, the remainder is gone. But in these cases, if A had been disseised, yet the remainder might have taken place; for, as the right of the particular estate was subsisting, so the right of the remainders which depended upon it was in the same condition, and A by his re-entry shall restore not only his own estate, but the contingent remainders likewise. But in that case, if J S dies, and then A dies before any re-entry, then the feoffees must enter to revive the use to his right heirs; because, until such entry, the disseisin continues, and the use to draw after it the possession, until that possession be restored, it cannot be carried to the use, and none have right to the possession but the feoffees.

1 Co. 130 b, 134 b, 135 b, 129.a; 2 Sid. 67."

'If one makes a gift in tail to A, remainder to the right heirs of J S, and A makes a feoffment in fee, and then J S dies, and after A dies without issue, yet the right heirs of J S shall never have the remainder; for by the feoffment of A, the estate-tail, and all remainders, were discontinued and vested in the feoffee, and there was not any particular estate in fact, or in right, to support the remainder when it should happen; and upon the death of J S this remainder was as capable of vesting as a remainder as ever it could be after, his right heir being then certainly known; but since by the feoffment of A the whole estate-tail, and the right of it, as to himself, was determined, and yet the remainder could not then take effect, it shall never afterwards. Otherwise it would be, if A had only been disseised, for then the right of the estate-tail had preserved the right of the remainder. And so it seems the law is at this day upon a feoffment to the use of A in tail, remainder to the right heirs of J S.

Co. 135 b; and vide 2 Roll. Abr. 796; 2 Sid. 64, 129; Vent. 188.

'A tenant for life, remainder to his first son in tail, remainder to B for life, remainder to his first son in tail; A having a son accepts a fine from B and then makes a feoffment in fee, and then B has issue a son born: the remainder to him is not destroyed; for the acceptance of the fine dis-

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placed nothing; and though the feoffment displaced all the estates, yet the right left in the first son of A shall support the right of the contingent remainders. For though the feoffment of A was a forfeiture of his estate for life, yet his son, who was next in remainder, and had a right thereto, was not bound to take advantage thereof, but might stay till the death of A; and as he might then have entered, so, if he dies, whereby the remainder and right of entry go over to another, they may likewise enter, after the death of A or before as they think fit. And it is there said, the way to preserve such contingent remainders is to limit the use to the husband for life, or more modernly to him for years, then to the use of the feoffees for the life of the husband, and then to limit the contingent remainders; or, if it were to the husband for life, remainder to trustees and their heirs during the life of the husband, remainder to the heirs or heirs male of the body of the husband, yet is not the fee or fee-tail executed in the husband otherwise than as a remainder, (a) by reason of the interposing limitation to the trustees, and therefore in such case the wife of the husband shall not be endowed.

Vent. 188; 2 Lev. 35; 2 Keb. 872, *Lloyd v. Brooking*. (a) 3 Lev. 437, *Duncombe v. Duncombe*, S. P. 1 Saund. 151, and 2 Vern. 755, [allowed to be good law by *Ld. Hardwicke*, in *Hooker v. Hooker*, Ca. temp. Hard. 13; *Elie v. Osborne*, 2 P. Wms. 610; *Mansel v. Mansel*, Ca. temp. Talb. 252.] || And vide *Fearne*, (7th edit.) 347, n. ||

“A covenants to stand seised to the use of himself for life, remainder to his wife for life, remainder to B his daughter for life, remainder to the first son to be begotten of the body of B and after to divers other sons of B in like manner, remainder to his own right heirs; and after, for disturbing the rising of the contingent estate, grants his reversion in fee without consideration, and with express notice of the first uses; and afterwards makes a feoffment in fee, and dies; his wife enters: B dies, and then the wife dies. It was adjudged, first, That this grant of the reversion, which was in himself, and out of which the contingent remainder was to arise, (being by way of covenant to stand seised,) could not prevent the contingent remainder from rising, because the grantee had express notice of the settlement, and therefore took it subject to the uses limited thereby. Second, That this feoffment did not destroy the contingent estate; for this was a forfeiture of his estate for life, and of the estate for life of the wife in remainder during the coverture, so that the daughter might have entered for the forfeiture during the coverture, which right of entry was sufficient to support the contingent remainder. But it is there said, it would have been more doubtful if the daughter had not had an estate for life, but that the contingent remainder had depended immediately upon the estate for life of the wife, because the feoffment of the husband passed his estate and the estate of the wife too during the coverture, and then neither of their estates were *in esse* to support the contingent remainders, and that in such case the contingent remainder should be destroyed. This was upon a conveyance made by Sir Edward Coke.

Wegg v. Villers, 1 Roll. Abr. 796; 1 Vent. 188, S. C. cited; 3 Mod. 310.

“Note, it was held by Glyn, C. J., in the above case, that if the feoffment of the Lord Coke had preceded the grant of the reversion, this had for ever destroyed the contingent remainders, and that no entry by those in remainder could have revived them. And therefore there seems a difference between such contingent remainders as are to arise out of the estate

of the person who makes the feoffment, and such as arise out of the estate of a third person. Where they are to arise out of the estate of the person who makes the feoffment, they are thereby for ever destroyed, because there can be no *scintilla juris* left in him, against his own feoffment to serve them, when they come *in esse*. But, where the *scintilla juris* is in a third person, there, if the first estates are reduced in possession before the happening of the contingency, the *scintilla juris* is likewise restored to such third person sufficient to serve them, when they come *in esse*; and therefore, in the above case, he having granted his reversion out of which the contingent uses were to arise, though he himself after made a feoffment by disseisin, yet, upon the entry of the wife after his death, the *scintilla juris* in the grantees of the reversion revived to serve the future use. But if after such feoffment they had released all their right, &c., or if they themselves, being lawfully in possession, had made such feoffment, the contingent remainders could never afterwards have arisen. But, where such feoffees to uses enter and disseise the tenant in possession, and make a feoffment in fee, there, by the entry of those in remainder in whom an estate certain was settled, the disseisin is purged, and by consequence their *scintilla juris* restored to serve the contingent uses.

2 Sid. 159." [Mr. Fearn, after explaining very fully this doctrine as to the necessity of an actual entry to restore or reduce contingent uses after they have been divested, adds,—“ But we ought to be very cautious how we at this day admit such a doctrine in practice; a doctrine which would lead us to conclude, that in common cases of strict settlement upon marriage, where the conveyance is by way of use, if the father, the first tenant for life, were by feoffment, &c., to divest the estates, leaving them a right of entry, the contingent remainders to the sons, &c., could not take effect; unless the mother, supposing her to take a remainder for life and to survive the father, or else the trustees to whom the remainder for preserving contingent uses was limited, or else the general grantees or releasees to whom the lands were conveyed to the uses expressed, should actually make an entry into the lands; an opinion which, with all due deference to what was delivered by the Court of K. B. in their arguments upon the case of Wegg v. Villers, I cannot persuade myself would hold at this day; for, first, as to what was resolved in the case of Wegg v. Villers, we are to observe, that as there was, besides the *right of entry in the daughter*, an *actual entry* made by the *mother* in that case; the point, whether the mere right of entry in the daughter would have been sufficient, without any entry by her or by the mother, or by the grantee, was not the question which came before the court; nor, of consequence, did the judgment of the court in that case depend upon or decide the doctrine in regard to that point. And as to the other cases put and agreed to by the court in their debate of the principal case, the opinions upon them were really extra-judicial; and, indeed, so far as they respected the supposed necessity of an *entry* to restore or reduce contingent uses, they appear to have been founded on an artificial strain of reasoning, much too subtle and metaphysical to bear any great stress. If we are to infer (as is said in the arguments in Chudleigh's case) a *scintilla juris* in the feoffees, that may enable them to enter and restore their *possibility of a seisin* (or, if the contingency has happened, their *actual seisin*) to serve the contingent uses, what is it that confines us to such narrow and insufficient limits in regard to the measure of this *scintilla juris*? Why not extend the inference one degree further, and suppose such a *scintilla juris* as may be competent to serve the contingent uses, without the unnecessary circuitry of an *actual entry*? The latter inference is certainly more adequate, and better adapted to the end proposed; and what is there discoverable in the statute of uses which excludes this and admits the former? Nay, how does it appear that any thing contained in that statute puts us to the necessity of recurring to any *scintilla juris* at all in the feoffees, or any entry to be made either by them or by the *cestui que use* under any preceding vested use, in order to restore and reduce a contingent use to the *capacity* of taking effect, whilst a right of entry subsists in any preceding *cestui que use*? On the contrary, does not the statute expressly enact, that where any person, &c., is seised to the use of others, such other persons, *i. e.* the *cestui que use*, shall be deemed and adjudged in lawful seisin, estate, and possession, &c., &c

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all intents, constructions, and purposes in the law, of and in such like estates as they had in the use, &c. ? (a) And must not these words, *to all intents, constructions, and purposes in the law*, be referred to the legal properties, qualities, and capacities of estates of the like degree or measure at common law ? If so, the *cestui que use* become entitled to, and take by virtue of this statute, estates possessing and bearing in themselves all the qualities, properties, and capacities of estates at common law, of the like degree or measure : now one of the legal qualities or capacities of an estate at common law, of the degree or measure of freehold, is, that after it is divested and turned to a right of entry, such right of entry will support a contingent remainder ; and one of the qualities or capacities of a contingent remainder at common law is, a capacity of being supported by such right of entry : why then do not a preceding vested use, of the degree or measure of freehold, and a subsequent contingent use, respectively acquire these legal qualities, properties, or capacities, amongst other qualities or properties of estates of like nature and degree at common law ? If they do, it is obvious there can be no necessity for any actual entry by any body to restore a contingent use, where there subsists a right of entry in a *cestui que use* of a preceding vested freehold to support it ; but such right of entry alone will preserve its capacity of vesting and taking effect. If we deny this, we at the same time deny that the *cestui que use* have lawful seisin, estate, and possession, &c., *to all intents, constructions, and purposes in the law*, of such estate as they have in the use. I think that a little attention to the apparent operation of the statute of uses, in relation to this point, will be sufficient to prevent our too hastily admitting a doctrine, which, without the aid of metaphysical subtleties, seems hardly reconcilable to the express force of that statute." *Fearne, C. R. (7th edit.) 300, 301.*

"This case was upon the same conveyance with that of *Wegg v. Villars* : but the case, as there put, is, that after such covenant to stand seised, Sir Edward Coke made a lease for years, and then granted the reversion without any consideration, and the lessee attorned, and after Sir Edward entered, and made a feoffment in fee before the birth of any son, and then died, and his wife entered ; and then it was agreed, that by the lease for years and the grant of the reversion, the whole estate of Sir Edward, out of which the contingent uses were to arise, is transferred, and that the lease for years should be good against the contingent remainders, but not against the remainders that were actually vested, as shall appear hereafter : but, as to the reversion, that being granted without consideration, was liable to serve the contingent uses when they came *in esse*, in the same manner as if it had not been granted over at all ; then, by such lease and grant of the reversion, the whole estate being out of Sir Edward, his feoffment after was a disseisin, and divested all the estates *in esse*, and turned them and the contingent remainders to a right, which right was restored again to possession by the entry of the wife after his death. But there it was clear, that when the wife entered she revived the estate to herself for life, and the contingent remainders also. And it is said in *Ventris*, 189, that it had been a question, whether a right of action would support a contingent remainder ; but that a right of entry would, was never doubted. And there it was agreed, that if A makes a feoffment in fee to the use of himself for life, remainder to B for life, remainder to the first son of B in tail, &c., remainder to his own right heirs, that in this case a feoffment by A will not destroy the contingent remainders, because the right of entry in B for the forfeiture preserves them, and if he does so enter, all the estates in remainder are re-vested, so that his son after his death may enter without any re-entry by the feoffees. But if after such feoffment B dies before entry, leaving a son, he cannot enter, though his contingent estate be not destroyed ; but in such case the feoffees must enter by the *scintilla*

(a) See 2 Co. 54 a · Moor, 212 ; 1 Leon. 258 ; 1 Mod. 155.

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juris left in them for such purpose to revive the contingent uses for the reason before given.

Heyns v. Villars, 2 Sid. 64, 98, 129, 157." || And see 12 Mod. 173; Fearn, 287, (7th edit.) || "1 Co. 130."

"If one makes a feoffment to divers others with several contingent remainders, and no estate is left in the feoffees, and after they enter and disseise the tenant in possession, and make a feoffment in fee, yet if the tenant in possession, or any of those in remainder in whom an estate certain was settled before the feoffment, re-enter, by this all the contingent remainders are reduced *in statu quo*, &c., and may be executed by the statute of uses; for the feoffees are but conduits to convey the estate, and have no power to destroy any contingent estate. But, upon such settlement, if the estates *in esse* are divested by disseisin, feoffment, &c., before the contingencies happen, and afterwards they happen, and then the estates *in esse* determine before any re-entry; if the feoffees release all their right in the land, or make a feoffment, or any other way bar their right of entry; in this case the contingent uses can never be revived to be executed by the statute, because the feoffees have barred their *scintilla juris*, and none *in esse* can enter.

1 Roll. Abr. 797, pl. 15, 16.

"If one on marriage of his son, &c., covenant to stand seised to the use of the son for life or for ninety-nine years, if he so long live, remainder to two strangers during the life of the son, upon trust to support contingent remainders, with remainder to the first and other sons in tail; this remainder to the two strangers is void, because there is no consideration; and then, by consequence, there is no estate to support the contingent remainder to the sons.

2 Lev. 52, 54; 3 Keb. 110."

'If tenant for life, with contingent remainders to his first and other sons, before the birth of any son, make a feoffment in fee, with condition of re-entry, the contingent remainders shall never arise, though the condition be broken and a re-entry made before the birth of any son; because the feoffment, though upon condition, was a forfeiture and determination of the particular estate, and the remainder not being capable of taking place is gone for ever, for the recovery does not purge the forfeiture.

Show. P. C. 151.' || Mr. Fearn notices this passage, and observes, that the case referred to does not seem to warrant C. B. Gilbert's doctrine; since the report does not put the case of a re-entry before the contingency happens: and according to an opinion of Lord Holt, 2 Salk. 577, 1 Lord. Raym. 314, if the tenant for life enter for the condition broken before the contingency happens, the contingent remainder, it seems, may vest. But in that case, if the reversioner enter for the forfeiture before the contingency happens, then is the contingent remainder destroyed. Fearn, C. R. 349, (7th edit.)||

'A tenant for life, remainder to his first and other sons in tail-male successively, remainder to B in tail, remainder over; A before the birth of any son surrenders to B, and then a son was born. In this case it was held, that by the surrender the contingent remainder was gone and destroyed; but the principal question in this case was, if the surrender was effectual? because B knew nothing of it till five years after the birth of the son, and then he agreed to it; and this in C. B. and B. R. was adjudged to be no such surrender as should destroy the contingent remainder; but the judgment, as to this point, was reversed in the House of Lords against the sense of all the judges except two. But it after-

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wards appearing, that at the time of the surrender A was *non compos*, this was held a void surrender, and not only voidable; and therefore, no estate passed by it, and then, by consequence, the contingent remainders were not touched.

Ld. Raym. 313; Carth. 211; Show. P. C. 150; 3 Lev. 284; 2 Salk. 427, pl. 2, 576, 618; Comyn, 45, pl. 30; 3 Salk. 300, pl. 10; 2 Vent. 198; 3 Mod. 301; Comb. 438, *Thompson v. Leech*.

‘A tenant for life, remainder to her first and other sons in tail-male successively; A takes a husband, and before the birth of any son, the reversioner in fee grants and conveys his reversion to the husband and wife by fine, and then A hath issue a son, and dies. And *per cur.*, though if A had survived her husband, she might have avoided and waived the estate taken by the fine, yet the contingent remainder to the son is utterly destroyed, there being none then *in esse* when the particular estate determined, for the husband and wife take by entirety, and therefore the estate for life of the wife was merged before the contingency happened, and the possibility which the wife had of avoiding the inheritance given by the fine, and thereby reviving her estate for life, will not preserve it; for if the contingent remainder cannot take effect when the particular estate determines, be it by surrender, merger, feoffment, or otherwise, it can never after arise.

2 Saund. 380; 2 Lev. 39; 3 Keb. 11, *Purefoy v. Rogers*; 4 Mod. 284; 3 Mod. 310, S. C. cited, and in several other books.’

‘A, tenant for life, remainder to his first and other sons in tail successively, remainder to B in fee: A and B, before the birth of any son, levy a fine of their estate to a third person. This makes no discontinuance or divesting of any estates, because each gives only his own estate. Yet by Hale and other good opinions, the contingent remainder is destroyed; because though the estates pass divided from them, yet they are united in the grantee, and so no particular estate in being to support the contingent remainder.

2 Saund. 386; 3 Keb. 12.”

‘A seised in fee devises his lands to B, eldest son of his brother C, for life, remainder to the first son of B in tail, and so to all his other sons in the same manner successively, remainder to D, second son of C, for life, remainder to his first and other sons in tail successively, and dies; B enters and dies, leaving his wife *enciente* with a son, then D enters as in his remainder, and six months after the son is born; and all this matter being found specially, it was adjudged in C. B. for D. against the son: first, because this being a contingent remainder to the son, and he not being born at the time when the particular estate determined, this became void; secondly, D being the next in remainder, and having entered before the birth of the son, was in by purchase, and therefore shall not lose his estate by a son born after. And this judgment was affirmed in B. R., for they held it plainly to be a contingent remainder, and not an executory devise or a springing remainder, for that would introduce a perpetuity not to be barred by a common recovery, because it would be the same to all the other sons; but here it being a contingent remainder, and not happening in time, it is gone for ever; and they relied on Archer’s case. But, upon a writ of error brought into parliament, the judgment was reversed by almost all the lords; because being in a will, they thought that by the meaning and equity thereof they ought not to disinherit the heir for such a nicety, and that a will was

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otherwise to be expounded than a deed; and therefore they construed it an executory devise or springing remainder to the first and other sons, and that the freehold should vest in D till the son was born. But all the judges were much dissatisfied with it, and did not change their opinions, but blamed the judge who permitted it to be found specially where the law was so certain and clear.

4 Mod. 259; 3 Lev. 408; Salk. 227, pl. 6; Carth. 309, *Reeve v. Long*. ||See Co. Litt. 298 a, n. 3.||

‘Note, That now by the 10 & 11 W. 3, cap. 16, provision is made, that after-born sons and daughters, to whom remainders are limited in contingency, shall take in the same manner as if they had been born in the father’s lifetime, though no estate be limited to trustees to preserve and support such contingent remainders, which act was made by reason of this case, and of the strictness of the law herein.’

||Vide 1 Term. R. 634; Doe dem. *Clarke v. Clarke*, 2 H. Bl. 399.|| βSee *Cooke v. Hammond*, 4 Mason’s R. 467; *Wager v. Wager*, 1 Serg. & R. 374.g

“One having three sons, A, B, and C, devises lands to them severally without limitation of any estate, and that *if any of them die, the other surviving shall be his heir*. A, the eldest, dies leaving issue; and if this part should go to his son, or to B and C, was the question. It was adjudged by three justices against Fleming, C. J., for the son of A, because nothing but a freehold passed by the devise, and the reversion in fee descending upon A, his eldest son, had merged his estate for life, and that after his death this could not be revived to vest the remainder in B and C. But Fleming, C. J., was of opinion, that this might well vest in B and C, by way of remainder, and then the words implied that every one should have it after the other; and therefore, though the freehold of A was merged by the descent of the fee, yet, to support the intent of the will, this ought to vest in the surviving sons for their lives.

Cro. Ja. 260; 1 Bulst. 61; *Wood v. Ingersole*, Swinb. 118.

“One having three sons, A, B, and C, devises lands to them severally without limitation of any estate, and if any of them die, his part to remain to the others, equally to be divided between them. A dies, having first granted the land for 1000 years to the defendant. It was adjudged, that though by the descent of the fee upon A the eldest son, his estate for life was merged, and so the contingent remainders to the other sons were destroyed, (for in these cases the remainder must be in contingency, and cannot vest presently, because it is uncertain which of the sons will survive,) yet that it should be good to them by way of executory devise, according to the opinion of Fleming in the case next before, (for so must his opinion be understood, though it is there said, by way of *remainder*,) and that this was the most reasonable construction to support the intent of the will. And they said, the case of *Wood v. Ingersole* (a) was best put in Bulstrode; for upon inspection of the record the words appear to be, *if any of my sons die, the ONE to be the other’s heirs*, which words import no certainty, which of the survivors, or whether both shall have the part of the son who dies first, and therefore that part of the devise was void, and by consequence would not carry over the estate from the son of A, or defeat the lease made by A. And Jones says, it was resolved in this case by the court, that to support the intent of the will it should be construed, that he devised for life to A, remainder to B and C, equally

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to be divided between them; and so in the other devises; and that by this construction an actual cross remainder for each one's part should be executed in the other. *Sed quære* of this construction.

2 Lev. 202; Sir T. Jon. 79; 3 Keb. 789, 924; Fortescue v. Abbott, Pollexf. 481; "¶ It is to be observed, that this case, as stated, is wrongly reported by Levinz, who says he *heard* that the court held it good as an executory devise. But both Pollexfen and Sir Thomas Jones, who argued the case, report the decision of the court that this was not a contingent but a vested remainder, and that every child took a particular estate in his or her house (land) for life, with remainder to the others for their lives, vested. Vide Fearn, 244, (7th edit.) (a) Vide Fearn, C. R. 342, (7th edit.) Butler.¶

"One devised lands to A, his eldest son, for life, and if he should die without issue living at the time of his death, then to B his second son, and his heirs; but if A had issue living at the time of his death, then the lands should remain to A and his heirs, and died. A entered, and suffered a common recovery, and died without issue, having by his will devised the lands to the defendant. B entered, and let to the plaintiff; and the question was, if A had by the will an estate for life only, with a contingent remainder to B? or, if the fee was vested in A with an executory devise to B? and, admitting it to be an executory devise to B, if the common recovery barred it? It was argued for the plaintiff, that A had the fee; for though an estate for life only is devised to him, yet by descent of the reversion the whole fee was executed in him, which merges his estate for life, and then the estate to B can be no other than an executory devise. For when all the fee is given to or vested in one person with a limitation of a fee to another person upon a contingency, this cannot be a remainder; for a fee cannot be limited upon a fee, as appears before, but of necessity this must take effect as an executory devise. But when only part of the estate, as for life or in tail, is given to one, and the residue to another upon a contingency, as to the right heirs of J S, who is then living, or to such person as shall be living in such house at such a time, this remainder is contingent. But here the whole fee is in A, either by the devise, by a transposition of the words, or by descent of the fee, and then the devise to B can be no other than an executory devise, which being to happen within the compass of one life, hath been allowed good. (Cro. Ja. 590, *Pet v. Brown.*) As to the second point, they relied upon the same case, that this cannot be barred by the common recovery. *Sed per totam curiam* it was adjudged, that A had but an estate for life by the will, and the remainder to his heir was not executed; for both the remainders to A and to B are upon a contingency, not a contingency upon a contingency, which the law will not allow, (for then by the same reason it might allow a hundred contingencies one after another, and so quite elude the statute of *quia emptores*,) but upon one and the same contingency, which looks several ways, viz., if A hath issue living at the time of his decease, then to him and his heirs; but if not, then to B and his heirs. And the case was thus considered, as if A had been a stranger, and not heir at law. But then considering him as heir at law, and that the reversion descended to him, yet, *per curiam*, not so absolutely as to merge and confound the estate for life given by the will against the express words and intent thereof; but there shall be an hiatus or opening to let in the remainders when they happen; and though A happens to be heir at law, yet this being matter *dehors* the will, no use shall be made of it in expounding the will; and Archer's case is express in the point, where, though Robert the

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devisee for life was heir, yet the remainder to his next heir male was a good contingent remainder, and the estate for life, not merged in the fee, should descend on him. And it cannot be supposed that this consideration escaped a quick-sighted reporter, but was omitted as a thing of no value. As to the second point, if the remainder to B be contingent, there is no doubt but it is barred or destroyed by the recovery, and so it would be by a bare surrender of the estate for life. And they all agreed, that if, by any construction, it could be made a contingent remainder, it should be so taken, rather than an executory devise, which could not be barred by a common recovery, and so would tend to a perpetuity. And note, they all seemed to agree, that the fee was not in abeyance, but descended to A, subject to such hiatus, and that *quoad* B, the devisee in remainder, A had but an estate for life. *Quære* if the construction in this case does not thwart the second of the two preceding cases, (a) where the court, allowing the remainders to be in contingency, held them destroyed by the descent of the fee upon the eldest son, which merged his estate for life, and therefore they were.

1 Lev. 11; Sir T. Raym. 28; 1 Sid. 47; 1 Keb. 29, 119, MSS. *Plunkett v. Holmes*.
 β See *Lippitt v. Hopkins*, 1 Gallis. 454; γ *Cro. Car.* 158, 360; 1 Co. 66." || (a) *Sed*
vide note, *suprà*, 350, according to which the case alluded to (*Fortescue v. Abbott*)
 is not at variance with the present.||

β A by his last will devised as follows: "I give and bequeath unto my brother E M, during his natural life, one hundred acres of land," being part, &c. "In case the said E M should have heirs lawfully begotten of him in wedlock, I then give and bequeath the one hundred acres of land aforesaid, to him the said E M, his heirs and assigns for ever, but should he the said E M die without an heir so begotten," then the land to be sold and the proceeds divided among the children of the testator. Held, that E M took but a life-estate and not a fee-simple conditional.

Shriver v. Lynn, 2 Howard, 43. g

[A devised lands to his sister, who was his heir at law, and her assigns for her life, and if she should marry, and have issue male of her body living at the time of her death, then to such issue male and his heirs male for ever; but if she should leave no issue male at her death, then to G and his heirs for ever. The question respected the title of the testator's sister's husband to be tenant by the curtesy of the lands so devised to her; and the court held, that inheritance was never executed in possession in the sister during her life, (notwithstanding the inheritance descended on her,) and therefore her husband could not be tenant by the curtesy; it follows, that the descent of the fee did not merge her estate for life, or destroy the contingency.]

Boothby v. Vernon, 9 Mod. 147.]

'Father and son are, the father conveys land to the use of himself for life, remainder to the use of the son for life, remainder to the first and other sons of the son in tail-male successively, remainder to the heirs of the body of the father, or to his right heirs, and dies before the birth of any son of his son; and if by the descent of the fee or tail upon the son the contingent remainders were destroyed, was the question? It was *argued*, that they were not, because the inheritance came to the son by descent, which was an act in law, and not by his own act; and therefore the law,

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which does no wrong, shall not destroy these contingent remainders, but that upon the birth of the sons the estate shall open again to let in the remainders. But it was *adjudged*, that the contingent remainders were destroyed by the descent of the inheritance upon the son; (a) and they relied on the case of Wood v. Ingersoles, (b) and held, that this case differed from the cases cited, where the estates were united at first upon making the conveyance, and if they should not afterwards open, so as to let in the remainders, the conveyance would destroy itself; but here, this descent was an act subsequent to the conveyance, and made an alteration in the estates limited thereby, and therefore had destroyed the contingent remainders.

Vent. 306; 2 Jon. 76; 3 Keb. 731, 820, Hartpool v. Kent. (a) For this vide Co. Lit. 28 a; 11 Co. 80; Lev. 11; Raym. 28; Sid. 47; Plunkett v. Holmes, 2 Lev. 202; 2 Jon. 79, Fortescue v. Abbott. (b) Cro. Ja. 260.

[Lands were conveyed to the use of A and his wife for life, remainder to the use of B the son of A for his life, remainder to the first and other sons of B in tail, remainder to A in fee. A and his wife died in the lifetime of B, who afterwards died without issue, leaving a wife. The question was, Whether the wife of B was entitled to dower in the lands? It was decreed she was: and Lord Chancellor, with one of the judges, was of opinion, that the estate for life in B was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.

Hooker v. Hooker, Ca. temp. Hardw. 13; Fearn's C. R. 342, (7th edit.) by Butler.] || The above cases as to the subsequent descent of the inheritance merging the particular estate, and thereby destroying the contingent remainders, at first appear irreconcilable with each other. But Mr. Fearn suggests a distinction by which they may be reconciled; viz., between the cases where the inheritance descends *immediately* from the person by whose will the particular estate and remainders are created (like the cases of Plunkett v. Holmes, and Boothby v. Vernon,) and those cases where either the descent is *mediate* from the deviser of the particular estate and remainders, or where the descending inheritance is not derived at all from such deviser (as in the cases of Crump v. Norwood, Hartpool v. Kent, and Hooker v. Hooker.)—In the first class of cases the descent of the inheritance seems not to merge the particular estate, while in the last class the merger takes place; and Mr. Fearn assigns satisfactory reasons for the difference. Fearn, C. R. 343, 344, (7th edit.) Butler.]

|| So also where there was a devise of gavelkind land to the testator's three nephews, William, John, and Robert, for their lives in common, and, after their respective deceases, the share of him or them dying to the heirs lawfully issuing of his and their body and bodies respectively, if more than one, equally to be divided as tenants in common; and, if but one, to such only one, his or her heirs and assigns for ever; and if any of his nephews should die without issue, or leaving such they should die without attaining twenty-one, then the share or shares of him or them so dying unto the survivor and survivors of his said nephews and the heirs of the body of such survivor equally, as tenants in common, and to hold the same as he had therein-before directed as to the original part and share. And for want or in default of such issue of his said nephews, he devised the premises unto his own right heirs. On the testator's decease one moiety of this remainder to his right heirs descended to his brother John, the father of the three nephews, being one of the testator's two heirs in gavelkind; and on the brother's decease it descended to his sons, the three nephews. The court held this to be a contingent remainder with a double aspect, and not an executory devise, and consequently that by the descent of the portion of the ultimate remainder in fee on the nephews, the par-

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particular estate in that portion was merged, and the contingent remainders in that portion were destroyed.

Crump v. Norwood, 7 Taunt. 362; and vide Doe dem. Davy v. Burnsall, 6 Term R. 30; Doe dem. Herbert v. Selby, 2 Barn. & C. 929. ||

§ One devised to his three daughters J, M, and A, during their lives respectively, certain specified parts of his real estate, and added: "It is my will that if any of my daughters die without issue, or if, having issue, and such issue all die in their minority, without leaving lawful issue, then I give the land so allotted to my other child or children's lawful issue, as tenants in common, to hold to them, their heirs and assigns for ever." J died in the lifetime of the testator; held, that the limitation over to the issue of his other daughters was good by way of an executory devise.

Way v. Gest, 14 Serg. & R. 40; and see Neave v. Jenkins, 2 Yeates, 414. g

'A and B, joint-tenants for their lives, remainder to the first son of A in tail, and so to the second, &c., remainder to the right heirs of B. Before any issue A releases to B, and his heirs, and after hath issue a son; and if by this release, before the birth of a son, the contingent remainders were destroyed, was the question? It was argued, upon the diversity in the above case, that this uniting of the estate for life with the remainder in fee, being by conveyance and act subsequent to the limitation of the contingent remainders, and before they came in being, had destroyed them; for now the estate for life upon which they depended is gone, and the whole fee executed in B, and therefore they can never after arise. But by three justices, *dissentiente Dolben*, it was *adjudged* that these contingent remainders were not destroyed; for to some purposes the whole fee was executed in B, immediately upon the first conveyance, and this release of A gave him no greater estate, nor in any other degree than he had before; for after such release he is in of the whole estate by the lessor, as he was before, and as he would have been, if it had come to him by survivorship: and his estate being at first given, subject to these contingent remainders, must open to let them in, when they happen, as it would have done had no such release been made; and though they were limited immediately after the estate for life to A and B, yet till they came *in esse* they did not prevent the closing of the fee in B, and therefore did not depend absolutely upon the estate for life, and have now no other impediment to hinder their rising than they had at first.' "Note, Ventris reports the same case to be adjudged, that they were destroyed, but gives no reason for the judgment; and the other two reporters were two of the judges that gave the judgment, and therefore are more to be relied upon."

'Vent. 345; 2 Jon. 136; Raym. 413, Harrison v. Belsey.' ||From this and the following case Mr. Fearn draws the conclusion, that the alteration in the particular estate, which will destroy a contingent remainder, must be an alteration in its *quantity*, and not merely in its *quality*. C. R. 338, (7th edit.) ||

'A copyholder in fee surrenders to the use of his wife and of B for their lives, remainder to the use of the heirs of the body of the surrenderor and his wife; B and the wife are admitted accordingly; after B surrenders his part to the use of the husband, and then the husband surrenders the whole to the use of C, and his heirs, who is admitted accordingly; then the wife dies, leaving issue, who brings ejectment for the moiety of the wife; and adjudged not maintainable; for when B surrenders his moiety to the use

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of the husband, this makes a severance of the jointure; and when the husband after surrenders the whole to C, he by this hath an estate for the life of B in the one moiety, and for the life of the wife in the other moiety; and though, if she had survived her husband, she might have defeated the surrender of her own moiety, yet now, she dying first, the estate of C as to that moiety is determined; and since he who would claim it must make himself heir of both their bodies, which during the life of the husband he cannot do, and yet the particular estate as to that moiety is determined; therefore the remainder as to that moiety which was contingent is destroyed and the husband's death can never set it up again; but for the other moiety, if the husband dies, living B, it will take place, else not, being contingent, and not capable of vesting during the life of the husband. And as to the husband's surrender to the use of C, and his heirs, this was no such forfeiture or determination of the estate for life as to give an entry to those in remainder, for then that had destroyed the contingent remainder of the whole; and though the wife had survived and defeated such surrender as to her own moiety, yet it appears before, that that would not have revived the contingent remainder, being not capable of vesting when the particular estate ended; but such surrender of the husband works only by way of grant for what he might lawfully pass, and not so strongly as livery of seisin.

Roll. R. 238, 317, 438, Lane v. Pannell.' [Vide Watk. Gilb. Ten. 266, and notes; and Fearn's C. R. 458.]

"A copyholder in fee surrenders to the use of his will, and after by his will devises the estate to B for life, remainder to the heir of his body begotten, for ever, and dies. B is admitted, and after surrenders to the lord of the manor to do with it as he pleases, and dies, leaving a son. Now, admitting the remainder to the heir of the body of B, to be a good remainder, and that such heir should take it by purchase, this surrender of B hath not destroyed it; for this operates only as a grant to the lord of his estate for life, and is no forfeiture to give an entry to a remainder-man; and by consequence continues in the lord to support the contingent remainder, in the same manner as it did in B, there being only a change of the person, but no alteration made in the estate; for it is still determinable upon the death of B as it was before, and not sooner.

2 Roll. Abr. 794, (6), Pawsey v. Lowdall." [So, in the above case of Lane v. Pannell, it is observable, that the surrender of the baron to B in fee did not destroy the contingent remainder; for the legal freehold being in the lord, the surrender of the baron passed no more than he lawfully might. Fearn's C. R. 470, (4th edit.) So, where copyhold lands were devised to A for life, remainder to his first and other sons in tail, &c., remainder to B in fee, and A before he had any sons born bought the reversion of B, and had it surrendered to his (A's) own use, thinking by that means to merge his estate for life, and so destroy the contingent remainder to his first son; it was agreed, that this surrender of the reversion would not bar the son, because the freehold and inheritance were in the lord: for there is not the like inconvenience as in freehold estates at common law, in respect of contingent remainders, where there is nobody against whom to bring the *proceipe*. Mildmay v. Hungerford, 2 Vern. 453.] ¶ But if the lord's freehold becomes vested in the owner of the customary estate by enfranchisement before the contingency happens, the contingent remainders are destroyed. Roe dem. Clewett v. Briggs, 16 East, 406.]]

"A, tenant for life, remainder to B for life, remainder to the first, second, and other sons of B in tail-male successively; A and B join in an indenture tripartite between A of the first part, and B of the second part, and C and D of the third part, whereby A covenants with C and D to levy a fine to other uses: B seals the deed; and it was argued by the sealing it

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should be said that B joined in the fine, and by the fine all the estates are divested and put to a right, and the contingent estates disturbed; and B is estopped from entering to revive them; and though he hath a son after, yet he cannot enter till the contingent use be revived by entry; which, as this case is, no person has power to do. But *per cur.* clearly—B's sealing the deed, only shows his consent that A may levy the fine; for he does not covenant, or transfer over his estate in remainder: and admitting that B should be estopped, yet his sons, who claim not under him, are not estopped to say, that there was a sufficient estate continuing to support the contingent remainders; and then, if they are preserved, every one, who hath right, may enter in his turn. And after it was adjudged accordingly; and said, there was nothing in the case worth an argument.

3 Keb. 759, MSS. Hales v. Risley.

"A covenants upon proper considerations to stand seised to the use of himself for life, remainder to B his son for life, remainder to the first and other sons of B in tail successively; remainder to the right heirs of A; after A is attainted of treason, and executed before the birth of any son of B. It was adjudged, that by such attainder the king had the fee-simple, discharged of all the remainders to the sons not then born, and that they were utterly barred. The reason seems to be, because they were to arise by way of use out of the estates of the covenantor, which by such attainder are come to the king; and he cannot be seised to the use of any person.(a) But it seems, if they were to arise out of an estate executed in feoffees, then the attainder of A, which could only forfeit his own estate for life, and remainder in fee, would not prevent them from rising. But the greater doubt in such case would be, if the feoffees themselves were attainted of treason before the birth of any son; for all the books agree, they have no estate left in them, but a *scintilla juris* to serve the contingent uses when they happen, and how far that *scintilla juris* is forfeitable, or their entry requisite to serve the contingent uses, when no actual disturbance is made of the possession, seems doubtful. For in other cases, unless the possession be disturbed by disseisin, feoffment, &c., no entry of the feoffees is requisite to raise the contingent uses when they happen, as appears before. *Ideo quære* of this.

Mo. 8, 15; Sir Thomas Palmer's case, Pop. 22." [(a) But here the question arises, how we are to reconcile this resolution with the principle that *any preceding vested freehold* estate will support a contingent remainder; for here, whatever effect the forfeiture of A's estate for life and remainder in fee might otherwise have had, yet as B had a *vested* freehold, why was not that capable of supporting the contingent remainder to his sons? If, indeed, there had been an office found antecedent to the birth of a son of B, that A was seised in fee, it might have accounted for the resolution in the above case, by taking away the *right of entry* of B, according to the distinction I shall notice after the next cited case. But, abstracted from a circumstance of that nature, which does not appear in the report of Sir Thomas Palmer's case, that of Corbet v. Tichborn, 2 Salk. 576, of much later date, seems to claim our better attention. It was a case where J S being tenant for life, remainder to his wife for life, remainder to his first and other sons, &c., in tail, remainder to himself in fee, committed treason, and afterwards had a son, and then was attainted; and upon a trial at bar in K. B. the court held, that whether the son was born before or after the attainder, the contingent remainder to him was not discharged by the lands vesting in the crown during the life of J S, because of the wife's estate, viz., a vested estate of freehold in remainder, which was sufficient to support it. For this estate of the wife, it seems, was not turned to a right, or affected by the forfeiture of the husband, nor the crown thereby in possession of any other estate than what J S was entitled to at the time; as appears by another case of Lynch v. Cote, 2 Salk. 469, where tenant for life, remainder to his first son in tail, remainder to J S in fee, was attainted of high treason, and died without issue. And upon

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its being urged, that the whole estate vesting in the king by 33 H. 8, c. 8, without any office finding the special matter, he in remainder could not enter, any more than if a general office had been found, which would have supposed a fee; it was held, that no other estate vested in the king by the said act than the party attained had; just as if a *special* office had been found; and therefore the remainder-man might enter on the king, the king's estate being determined. For the statute saved the right of others; though it was otherwise where an office found an estate in fee in the party attained. Fearne's C. R. 282, 283, (7th edit.); "2 Jo. 773; Keb. 732; 3 Mo. 196, 374, 389, 391."

"A seised in fee of lands, after 27 H. 8, makes a feoffment in fee to the use of D his wife, for her life; and if he survives his said wife, then to the use of himself, and of such woman as he shall happen to marry, for their lives, for the jointure of such wife, remainder to B in fee. Afterwards, B and the feoffees by consent of A join in a feoffment in fee to the use of A and his wife for their lives, remainder to C in tail, remainder to A in fee; and this was by deed and letter of attorney to make livery. Afterwards B levies a fine with proclamation to other uses; and then D his wife dies, and he marries a second wife, and dies; and she, by the assent and command of the first feoffees, and after the five years after the fine, enters to raise the use to herself. And by the better opinion her entry was not lawful; for by the second feoffment all the estates were divested and put to a right. And whether such feoffment were only the disseisin of the attorney, who made the livery, and the confirmation of him in remainder, and of the feoffees; or the disseisin of all; yet by such joining in the deed of feoffment, the feoffees have barred their *scintilla juris*, and cannot enter to revive the future use to the second wife. And A, by his fine, hath barred himself to enter in right of his wife to reverse the first estates; and his first wife could not enter, being covert; and therefore, there being none to enter to revive such future use, it is by the feoffment destroyed, and the second wife's entry unlawful.

Dyer, 339—342, 198, 199; 2 Leon. 14; Pop. 76; Co. 1, 136, Brent's case." [Vide Fearne's C. R. 290—301, (7th edit.)]

"A, seised of lands, makes a feoffment in fee to the use of himself and his wife for lives; and after their deaths, to the use of B their son for life; and after his death that the feoffees should be seised *ut in eorum pristino statu*, upon condition that they should receive the profits, and pay to C, wife of B, 20*l.* *per annum* during her life; and after that they should be seised to the use of the heirs male of the body of B. The feoffor and his wife die; B enters, and makes a feoffment to D, and dies; and after C dies; and then the heir male of the body of B enters. It was adjudged lawful; and that the feoffment of B was no discontinuance, nor barred the heir of his entry. But this was without any great argument, and no reason given for the judgment. However, it seems well given; for by reason of the intermediate remainder to the feoffees, B was not seised by force of the entail when he entered and made the feoffment; and then, by Littleton's rule, his feoffment makes no discontinuance; and, by consequence, as the feoffees might have entered presently for the forfeiture, they being next in remainder, so, after the death of C, the heir of the body of B may likewise enter, because then the preceding estates are determined. And if the feoffment of B made no discontinuance, there is nothing to hinder their entry, though they are in of the entail, by descent from their father, after such entry.

Cro. Eliz. 277, Mason v. Nevill; Co. Lit. 347 (a); Raym. 37.

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“A, seised of lands in fee by indenture, covenants with B, in consideration of a marriage intended between A and C daughter of B, to stand seised to the use of himself and his heirs till marriage, and after to the use of himself and C and the heirs of his body, remainder to his own right heirs; and then before the marriage he makes a lease for thirty-one years, reserving rent, to begin after the end of a former lease, then *in esse*. The marriage takes effect: and in ejectment after the death of A it was held, that this lease should bind the future use to the wife, as a lease upon good consideration by the feoffees at common law should bind *cestui que use*; but that subject to that lease the use to the wife should arise, because the same seisin and freehold continues; and therefore the use to the wife should arise out of the residue of the estate, and she shall have the reversion and rent reserved upon the lease; for wherever the statute finds a seisin to uses, there it carries the possession to them; and notwithstanding such lease for years, yet the seisin to the uses continued.

Cro. Eliz. 764, 854; 2 Roll. Abr. 611, 792, 794, (4), Wood v. Reigold.

“And yet we have another case in our books where it was held the wife was not at all bound by such lease. The case was this:—A covenanted, in consideration of love as to his son, to stand seised to the use of his son for life, remainder to the use of such woman as he should after marry, for her life; remainder to the first and other sons in that marriage, in tail, &c. And after, the son proving extravagant and being in jail, A, the father, to disturb the rising of the use to the future wife, makes a lease for 1000 years, and then the son marries the jailer's daughter. And yet it was held, that she was not bound by this lease, but should have the land discharged of it. And the reason given is, because there being a good estate by the first limitation to arise when the wife is known, if this be not destroyed, this cannot be charged or encumbered, because it hath relation to the covenant, and therefore the lease shall be construed to arise out of the reversion which the covenantor had in him, and might lawfully charge. But to difference this case from the former, it is to be observed, that here the covenantor had nothing but a reversion in him; he had no estate for life, as he had in the case preceding: besides, this lease was made without any consideration, and for no other purpose but to defeat the rising of the use to the wife. And if it should be good in possession, being for 1000 years, and no rent reserved upon it, it would defeat the whole settlement; and therefore it is more reasonable to construe such lease to arise out of the reversion which the covenantor had, and might lawfully charge, than to allow it good against the wife who came in upon so valuable a consideration as marriage. But, if such lease had been made for money, or, if a rent had been reserved upon it, then though the lessor had not any estate for his own life, yet such lease had been good against the settlement: because, though it was made in consideration of marriage, yet not being with any woman in particular, nor in consideration of any marriage portion, it would be fraudulent and voluntary, as to any subsequent purchaser for a more valuable consideration, as money or rent is.

Cro. Ja. 168; 2 Roll. Abr. 293, (1), Bold v. Sir Henry Winston; Co. 3, Twyne's case.

“A gives lands to the use of B for life, remainder to his eldest son in tail, remainder to the right heirs of B; and before the birth of any son, B makes a lease for years, and then a son is born: he shall avoid this lease

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after the death of B, for the freehold not being altered, so that the contingent remainder may well take place, this lease for years shall not affect it, but shall be construed to arise out of the estates which B had, and might lawfully charge, and shall be subject as they would have been, to open and let in the remainder, when it happens. But, if such lease had been made for a valuable consideration of money or rent, then it would come within the rules before mentioned, as I conceive.

2 Roll. Abr. 794, (5).

“A, seised in fee, levies a fine to the use of himself for life, remainder to the use of such woman as he should after marry, and should survive him; remainder to B in tail: then A marries C, and after, by fine, reciting that he was tenant for life, remainder to said C for life, he and C grant the said lands to a stranger for forty years, if he and his wife, or either of them, should so long live; A dies; and if C was barred was the question? And *per totam cur.* she was barred by estoppel. Yet they agreed, that if a lease be made to one for life, remainder to the right heirs of J S, who is living, and after his eldest son grants or levies a fine of such remainder, yet after the death of J S, he shall enter, because he had nothing in him at the time of the grant or fine, and therefore such grant or fine were merely void. And there, two judges against two, held, that the fine had extinguished this future use by way of prevention. But a *quære* is made of it, because it was but a grant by tenant for life, which ends with his death. This is the case, as it is reported by Moore. But in Croke, the case is reported to be, that after such settlement the husband and wife levied a fine to a stranger in fee, who granted and rendered the land to the husband for life, remainder to the defendant for sixty years, remainder to the right heirs of the husband; and that the husband died, and B, who had the remainder in tail by the first settlement, entered and let to the defendant; and that after C married again, and she and her husband let to the plaintiff; and upon special verdict found, it was adjudged for the plaintiff. Which proves, that the wife was not bound even by estoppel, for then it could never have been adjudged for her lessee the plaintiff; and that the joining of the wife in the fine signified nothing. But, then, as it seems, this must prove too, that the fine was not levied in fee as it is reported; for then clearly the contingent remainder to the wife would have been destroyed; because by such fine the estate for life of the husband was determined, and an entry given to him in the remainder for the forfeiture, before the contingent remainder could take place; and then, by all the cases before mentioned, it appears to be for ever destroyed. And therefore taking it to be only a grant by fine for years, and not for any valuable consideration, then it determined by the death of the tenant for life who granted it; and though it had been for a valuable consideration, then it determined by the death of the tenant for life who granted it. And indeed, admitting it had been for a valuable consideration, yet I cannot see how it could have continued longer than his life, or bound the contingent use; for such lease by *cestui que use* in possession differs from a lease by feoffees to uses at common law, or by covenantor to stand seised to uses; for there, in both cases, the use takes effect out of the estate which shall serve and supply the uses; and therefore shall bind or not bind as it happens to be made for a valuable consideration, or voluntarily, as appears before. But, where such lease is made by *cestui que use* in pos-

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session, this takes its effect out of his estate only, and by consequence can continue no longer than that does; and then, when the freehold is not destroyed, the contingent remainder may well vest, nothing being done to disturb or displace its rising. *Quære* therefore of this case.

Cro. Eliz. 826; Mo. 634, Wells v. Fenton; Poph. 5.

“A covenants upon proper considerations to stand seised or make a feoffment in fee to the use of himself for life, and after a part to the use of B, his wife, for life, for her jointure, without waste, and after to the right heirs of A, provided that if the heir of A disturbs B, that then the use to the right heirs of A shall cease, and that then A and his heirs, or the feoffees, &c., and all others shall stand seised to the use of B and her heirs. Afterwards A makes a lease for 100 years, to begin after the death of B, rendering 12*l.* rent, and dies. The heir disturbs B and breaks the condition; yet by the two chief justices it was held, that the future use to B in fee was checked by this lease, though the lease was but an *interesse termini* till B's death. *Et quia non potuit surgere tempore mortis* B, by reason of the lease for years, *it is destroyed for ever*. But *quære* of this case, for by the other cases preceding it appears, that, at most, such contingent uses are only bound by the lease for years, and not that neither, except where they are made for a valuable consideration. But here, the reason given why this contingent limitation to the wife is destroyed by making such lease for years, is the same that is given where contingent remainders are destroyed by making a feoffment in fee, whereas the reasons and operations of the one and the other are very different. *Ideo quære* of this case. Note—Croke cites the resolution of this case, and says, the reason thereof seems to be, because the use limited to the right heirs was the ancient reversion, and no new estate, and then there could not be a condition annexed thereto. But this seems no good reason; for an executory use may as well be limited to arise upon a condition precedent as an executory devise, and then the statute carries the possession after it; and why it may be created by original limitation, and not out of the reversion, after other estates, will be difficult to reconcile, since the reversion is as much the owner's, as such, as the possession was before any limitation at all made; because the first had a fee, though it was but a base and determinable fee. But yet in a will, such limitation has sometimes been held to be good, not as a direct remainder, but as an executory devise. But this is not law, because it is the affectation of a perpetuity, since such contingencies cannot fall till after the entail is spent, which is too distant to expect.

Mo. 743, Barton's case; Cro. Eliz. 765.” ||Mr. Fearn says, the reason of this case seems doubtful and obscure; C. R. 278, (7th ed.)|| “Cro. Eliz. 765.”

“So, a gift at common law, before the statute of Westm. 2, to one, and the heirs of his body, and if he died without heirs of his body, to go over to another, this was a void remainder, because the first donee had a conditional fee, which, after issue, he may dispose of for ever, and bar the donor of his possibility of reverter; and therefore such possibility could not be good as a remainder, nor did any formodon in remainder lie at common law, when all inheritances were fees absolute, or conditional.

Plow. 235 a, 339 b, 248, 249; 2 Inst. 336; Vaugh. 36.

“So, where one devised lands in London to the prior and convent of B, *ita quod reddant annuatim decano et capitulo Sancti Pauli* 14 marks; and if they fail of payment, that their estate shall cease, and that the said dean and chapter and their successors shall have it: it was held by Baldwin and Fitzherbert, the greatest lawyers of the age, as my Lord Vaughan says,

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that this remainder was void; because the first devise carrying a fee, nothing remained after to be disposed of; and executory devises, after a fee-simple, were in former ages unknown, which is the reason that this case is denied by some to be law. And it was held, that, for the condition broken, the heir of the devisor should enter; of which more hereafter.

Dyer, 33 a, pl. 12; Finch, 46; Swinb. 122; 1 Brook. 234, (2); Cont. Vaugh. 277.

"But this rule, that a fee cannot be limited after a fee, hath been long since exploded, in case of devises, and of uses, where the first estate, though in fee, is limited to determine upon a contingency that may happen within the compass of a life or lives in being, or some reasonable time after. And the reason of giving way to it at first seems to have been, to let men into a means of providing for the several branches and exigencies of their own family.

3 Chan. Cases, 19, 22, 31, 36, 49;" *β* and see Lippitt v. Hopkins, 1 Gallis. 454; Willis v. Bucher, 3 Wash. C. C. 369; Lessee of St. John v. Chew, 12 Wheat. 153; Lillebridge v. Adie, 1 Mason, 234.*g*

"The first case we meet with to this purpose, is this. In debt against A, as son and heir of B, he pleads *riens per descent*, but of the third part of the manor of D the plaintiff replies, that he had the whole manor of D by descent; and upon issue it was found, that the said manor was held by knight's service, and that B, father of the defendant, by his will in writing devised it to his wife, till the defendant his son should come to the age of 24 years, and when he came to the said age of 24 years, that he should have the whole to him and his heirs for ever, his wife having a third part thereof during her life; and if her said son should die before the age of 24 years without issue, then the whole should be to the wife for life; and after her death to C in tail, remainder to the right heirs of the devisor. It was found that the wife was dead, and that the son had attained his age of 24 years; and it was adjudged that he had the fee by descent, and so assets; for the entail with the remainders over not being to arise to A unless he died before 24; and so that part of the devise being become void by his attaining 24, then it rested wholly upon the first part, which being a devise to his son and heir apparent in fee, is void, and he shall take by descent, notwithstanding such devise. And he could not have an estate-tail in the interim till he attained 24, and then to have the fee as a remainder, because the entail was only to arise to him upon his dying before 24, as a condition precedent; so that neither the tail nor the fee could vest in him presently, by force of the devise; but it was as if he had left the fee to descend to him and his heirs, and only said, if my son die without issue before 24, then I give the lands to my wife for life, and after to C in tail, &c., which is a good executory devise upon the happening of the contingency, and the fee, in the mean time, descends as it would have done if there had been no will. And whether by the words, *if his son died without issue before 24*, an estate-tail should vest upon such death, or, that they should be only the terms and conditions upon which the executory devise was to take place, and after no estate at all, seems doubtful; though the case of Gardiner and Sheldon, after mentioned, seems to make for the latter: for, if he died before 24, leaving issue, and that being made the condition upon which the remainder limited after were to arise, could be no condition to vest an entail in himself; because he and his issue, that is, all who could take the entail, were to be dead before the entail could vest, and then it could not vest for want of persons to take it, which would make

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the devise idle and repugnant as to that part : therefore, these words seem to make no alteration of the estate the law would cast upon the son by descent, but to be wholly relative to the limitations after, as the modus upon which they were to take effect, and not to control the operation of the law in the mean time, in giving him the fee by descent. And to construe the case otherwise, would make it wholly useless to the purpose for which it is cited by my Lord Chancellor Nottingham in the Duke of Norfolk's case ; for there, either it must create an entail to begin when all the issue who were to enjoy it were dead ; or, it must make an entail at large with the remainders over ; and then there is no great mystery in the case. The first is impossible, and the latter cannot be, because it is confined to his dying before 24 ; for, if he survives that age, it is not to take place.

2 Leon. 11 ; 3 Leon. 64, 70 ; Dyer, 124 ; Hynd v. Lyon, Cro. Eliz. 205 ; 2 Roll. Abr. 626, (3), 839, (1) ; 2 Mod. 291. [Vide Scott v. Scott, Ambl. 383, *contra*. But *quære* of that case, and whether it can be supported either by principle or authority.] But *vide infra*.

"One seised of lands in fee by his will in writing devises Blackacre to A his daughter, and her heirs, and Whiteacre to his daughter B and her heirs, and if she die before the age of 16 years, living A, then A shall have Whiteacre to her and her heirs ; and if A die having no issue, living B, then B shall have the part of A to her and her heirs ; and if both die, having no issue, then to J S, and his heirs, and dies. B attains her age of sixteen years, and then dies without issue in the life of A. And first, it was held, by three justices against Dyer, that the daughters had an estate-tail upon the whole will, and not a fee determinable upon a contingency subsequent. Secondly, that by the words, *if both die without issue*, no cross remainders in tail were created by implication ; but that upon B's death without issue after sixteen, J S should have her part presently, without staying till the death of A without issue.

Dyer, 330 ; 1 Vent. 212 ; 2 Roll. Abr. 829, (3) ; Vaugh. 267, Clache's case. *β*See Holmes v. Holmes, 5 Binney, 252 ; Gest v. Way, 2 Whart. 445 ; Ashton v. Ashton, 1 Dallas, 4 ; Cheeseman v. Wilt, 1 Yates, 411 ; Robinson v. Adams, 4 Dallas, Appendix, xii.*g*

"A copyholder in fee surrenders to the use of B an infant and his heirs, and if he dies or marries before the age of twenty-one years, then he surrenders to the use of C and his heirs ; this was held a good surrender to the use of C upon such contingency, though B had a fee before ; because the contingency was to happen within the compass of a life, or upon the death of one then in being. But it is said by Rolle, that the surrenderor died before the contingency happened, in which case the use could not rise to C, though it happened after ; because, upon the happening of the contingency, as this case is, the surrender is to operate as a new original surrender to the use of C ; and this cannot be when the person who should make it is dead before, any more than an attornment after the death of the grantor shall avail the grantee of the reversion. But, if he had surrendered to the use of his will, and then had, by his will, devised such estates, they would be good, because the surrender was made to supply and serve all the contingencies and limitations of the will, and the use in the mean time vested in the surrenderor and his heirs ; whereas the surrender in the other case would, according to the wording of such instrument, operate double as to original surrenders. *Quære*.

Cro. Ja. 376 ; Godb. 264 ; 2 Roll. R. 119, 137, 253 ; 2 Bulst. 27 ; 2 Roll. Abr. 792.
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794, *Sympson v. Southern*. *Note*.—Several books put this case of an infant *in ventre sa mère*, and turn the defect of this conveyance in the remainder on the want of a person in being to take immediately." [Mr. Fearné referring to this case of *Sympson v. Southern*, in his Essay on Remainders, says, that according to Croke, it was resolved, that the surrender to the use of C was void, for that a man could not make such a *conditional surrender* to operate *in futuro*. On the other hand, Mr. Fearné says the same case, as reported by Rolle, is cited in *Lex Custumaria* (121) as an authority that such future uses are good, and that a fee may be limited on a fee upon a contingency in copyhold estates. And this, he says, the case in Rolle's Abridgment seems to leave undecided. But, he adds, in Gilbert's Tenures, (260, 261,) it is said, that such a resolution seems not to be grounded on so good reason as the contrary resolution in Croke; for the use upon a surrender of a copyhold is not like a use or trust at common law; but he who is admitted upon a surrender is admitted to the legal *customary* estate, and is not seised to a *use*; therefore uses upon surrenders are, in general, governed entirely by the same rules as conveyances at common law, in which such limitations were not allowable; and that upon this principle it seems a fee upon a fee in case of a surrender of copyhold is not good, any more than in a conveyance at common law. But the above opinion of Gilbert is, says Mr. Fearné, I think, excluded by decided cases; for the validity of conditional limitations in surrenders of copyholds appears to have been admitted in the case of *Stocker v. Edwards*, or *Edwards v. Hammond*, (2 Show. 398, and 3 Lev. 132, where the same case seems to be somewhat differently reported. Fearné's C. R. (7th edit.) 277, and vide *Welcock v. Hammond*, cited in 3 Co. 20 b; *Brian v. Cawson*, 3 Leon. 115.) And the decision in the case of *Sympson v. Southern* may be referred to the point of the *habendum* after the death of the surrenderor being void, taking that as the *conditional future operation*, which was denied to the surrender. And in the case of *Paulter v. Cornhill*, Cro. Eliz. 361, Beaumont, Justice, conceived the limitation of a fee upon a fee as good in surrenders of copyholds as in uses of land upon a feoffment. So, says he, in the case of a surrender of copyholds, to the intent the lord should admit A, whom the surrenderor intended to marry, after marriage; until marriage to the use of himself and his heirs, and after marriage to the use of himself and A in tail; the whole Court of C. B. held (*Bently v. Delamore*, 1 Freem. 267, 268, and vide *Calth. Reading*, 31, 32, for the same point; and vide *Taylor v. Taylor*, 1 Atk. 386.) that it was good enough to limit a remainder upon a contingent fee in copyholds; as in case of mortgages of copyholds a surrender *in futuro* is good, for the freehold remains in the lord. Thus far Mr. Fearné; vide Fearné's C. R. 277, (7th edit.) But, if we carefully examine the different reports of the case of *Sympson v. Southern*, and the other authorities to which Mr. Fearné refers, it will be found, perhaps, that they will not support the position they are brought to establish, and that the above doctrine of our author, advanced in his *Tenures*, remains unimpeached, and must be admitted to be sound law.—As the case of *Sympson v. Southern* is reported by Rolle (1 Roll. R. 109, 137, 253,) judgment is said to have been given for the party who claimed the ulterior fee. But the report is very obscure, if not contradictory in many places. The court are there said to have been of opinion with Coke; but Coke's argument, both in Rolle and Bulstrode, seems incompatible with such an opinion. In Croke, (Cro. Ja. 376,) the judgment is said to have been given for the party claiming under the heir at law, and so it is said in Godbolt and Bulstrode. (Godb. 264, 2 Bulstr. 272.) In Rolle's Abridgment it is first noticed with a *dubitation* (2 Roll. Abr. 791, *Uses* (P), pl. 2); and afterwards, when it is mentioned as adjudged, it is declared that the ulterior fee never arose, as the contingency did not happen in the life of the surrenderor. Ibid. 794, (S. 3,) pl. 8. In *Lex Custumaria*, (120, c. 15,) the ulterior limitation is said to have been good; but the author rests himself on the first statement in 2 Rolle's Abridgment without asserting the *dubitation*. Indeed he only translates from that of Rolle, and with Rolle calls the *ulterior fee* a *remainder*. As, therefore, it is only in Rolle's Reports that the judgment of the court is said to have been given in favour of the person claiming the ulterior fee; and as Croke, Godbolt, Bulstrode, and even Rolle himself in another and better considered work, declare that the judgment was given against him; and as the author of *Lex Custumaria* is no authority himself, but depends only upon a quotation from Rolle, without noticing the *dubitation* inserted by that writer, this case of *Sympson v. Southern* can surely not be regarded as establishing the doctrine that a fee may be limited upon a fee in a surrender of copyholds.—To proceed, then, to an examination of the *decided* cases mentioned by Mr. Fearné as supporting that doctrine. In the case of *Stocker v. Edwards*, as reported by Shower, a conditional limitation was said to have been good in a surrender. But, if the case of *Stocker v. Edwards* be the same with that of *Edwards v. Hammond* as reported

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by Levinz, and Mr. Fearné seems to consider it so, it is indeed "somewhat differently reported" by the latter writer. In Shower, the surrender was "to the use of the surrenderor for life, and after to the use of John his youngest son, and the heirs of his body, if he attained the age of eighteen years; and if he died before he attained that age *without issue male*, then to his right heirs." Whereas in Levinz, the limitation was, "to the use of the surrenderor for life, and afterwards to the use of his eldest son and his heirs if he lived to the age of twenty-one years; provided, and upon condition, that if he died before twenty-one, that then it should remain to the surrenderor and his heirs." But what puts an end to the application of the case in Levinz is, that in that case the surrender was *to the use of a will*; though that important circumstance is omitted in the translation of Levinz. The words in the original are, that the copyholder surrendered *a son volunt, et devise al use luy mesme pur vie, et apres al use son eigné fitz et ses heyres, s'il vivra al age de 21 ans*, provided, &c., as above. The case of Welcock v. Hammond, cited by Lord Coke, was also on a surrender to a will, as was the case of Brian v. Cawsen in Leonard, and that of Taylor v. Taylor in Atkins. In the case of Paulter v. Cornhill, indeed, Beaumont, Justice, conceived a fee limited upon a fee by a surrender to be good enough; for, said he, it shall be as a use limited upon a feoffment, and these uses shall rise out of the first surrender. But as to the point, whether a fee might be so limited on a fee, it is observable, that we are informed by the reporter, that "the court spake not much thereto, but willed to have it specially found." The case of Bentley v. Delamore, in Freeman, indeed, so far as it goes, countenances the doctrine, that a fee may be limited on a fee by surrender. But that case is very loosely given; and it is there said, that "a surrender *in futuro* is good; and the mischief" [here seems an omission in the report] "for the freehold remains in the lord." Now, the validity of a surrender *in futuro* has already been denied by Mr. Fearné himself.—The only authority which remains is the passage referred to in Calthorpe; and that, to be sure, supports Mr. Fearné's position. The words are these:—"If a copyhold be surrendered to the use of J S and his heirs, until he shall marry A G, and after the said marriage, then to the use of them two in tail special; if after they do marry, then is the surrender to them in tail, and till then to him in fee."

Upon the whole, therefore, we find that the case of Sympton v. Southern militates against rather than supports the doctrine, that a fee may be limited upon a fee of copyholds by surrender; that the passage in *Lex Custumaria* cannot be a better authority than the book it rests upon; and in truth, that the extract it gives is not faithfully given, as it delivers that *absolutely* which was originally accompanied with a *dubitatur*; that the case of Stocker v. Edwards, in Shower, is shaken by the report of what Mr. Fearné himself considers as the same case in Levinz; and that the case in Levinz was *on a surrender to the use of a will*; that the cases of Wilcock v. Hammond, Brian v. Cawsen, and Taylor v. Taylor, were on surrenders to will also; that in the case of Paulter v. Cornhill, the opinion of Beaumont was not acceded to by the court, but was itself founded upon a principle which has been repeatedly denied; namely, that the limitation should be considered as a use limited on a feoffment. 1 Brownl. 127; 1 P. Wms. 17; 1 Lord Raym. 627; 1 Ves. 257. That the case of Bentley v. Delamore is very loosely given, and filled with absurdity; that if it asserts that a surrender *in futuro* is good, it might easily admit the other position; that if it is erroneous in the one instance, it has no great claim to authority in the other; that the doctrine, therefore, rests on the solitary passage in Calthorpe; is it then too much to say, that the main foundations upon which Mr. Fearné has professed to establish his doctrine fail him, and that, therefore, notwithstanding the great authority of his name, we shall not be justified in pronouncing that a fee may be limited on a fee by a surrender of copyholds? Besides, a surrender of copyholds is to be construed as a common law conveyance: (a)—If then, as is universally acknowledged, a fee cannot be limited on a fee by common law conveyance, it follows, as an inevitable consequence, that a fee cannot be limited on a fee by a surrender; for if it may, then a surrender is not to be construed as a common law conveyance, which is contrary to our position.] || See on this subject Sanders on Surrenders of Copyhold Property, &c., 1819; Watkins on Copyh. (4th edit.) 262, and note (1) by Mr. Coventry; Scriven on Copyh. 184, (2d edit.); Cru. Dig. vol. 5, p. 590; Prest. Abst. v. 2, 34. ||

"One having issue A, his only daughter and heir, by will devises lands in D to her and her husband, and her heirs, upon condition that they should assure lands in F to his executors, and their heirs, to perform his will; and, if they failed, then he devised the said lands in D to his executors

||(a) This point does not seem fully settled. ||

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and their heirs, and died. It was adjudged to be no condition; for that by the descent to the daughter, being heir, it would be destroyed: but it was held a limitation, or executory devise, to his executors, in case the assurance was not made; and that they might, for breach thereof, enter and sell; for though a fee cannot be limited upon a fee absolute, yet upon a fee determinable it may; and in this case it inures as a new original devise to take effect, when the first devisees failed to make the assurance.

Cro. Ja. 592; Palm. 135; 2 Roll. R. 218, 425; Dy. 33 a, in margin; Fulmerton v. Steward. and Cro. Eliz. 359; the same case by the name of Cleer v. Peacock, Swinh. 106, 120.

“One by his will devised lands to his mother for life, and after her death to her brother in fee; provided, that if his wife (being then *enceinte*) be delivered of a son, that then the land should remain to him in fee, and dies. The son is born; and it was held, that the fee of the brother should cease, and vest in the son, by way of executory devise, upon the happening of the contingency.

Dyer, 127 a, in margin.

“One by his will devises several rent-charges or annuities out of his lands to his younger children; and devises, that if his heir paid the said annuities to his children, that then he should have the said land to him and his heirs; and if he failed of payment, then his executors should have the lands; and if they failed to pay them, then his children should have the lands to them, and the survivor of them, and dies. The heir makes a feoffment in fee of the lands, and then the annuities were not paid. It was adjudged, the feoffment has not destroyed the contingent limitations, but that for non-payment they could vest according to the will; and there a difference was taken between contingent remainders, which depend upon a direct limitation, and are to persons unknown, or not *in esse*, and contingent uses, or devises to persons *in esse*, and known, which are to take effect upon a collateral condition or contingency; for these cannot be destroyed or given away by feoffment, as the others may; but the land is charged with them into whose hands soever it comes.

2 Roll. Abr. 793, (2); Purslow v. Parker, 2 Roll. R. 219; Palm. 136; Cro. Ja. 144; Mesne case *per nos* of Molineux v. Molineux.

“One devised lands to his wife till his son came to the age of twenty-one years, and then that his said son should have the lands to him and his heirs: and if he died without issue before his said age, then his daughter should have the said lands to her heirs. This is a good contingent or executory devise to the daughter, if the contingency happens; and, in the mean time, the fee descends to the son and heir; and if he lives till twenty-one, though he after die without issue, or leave issue, though he die before twenty-one, yet the daughter is not to have the lands; because he is to die without issue, and before twenty-one, else the daughter cannot take.

2 Roll. R. 217, 297; Palm. 132, Boulton's case, cited to be reported by Lord Chancellor Egerton, 6 & 7 Eliz.” *β* Lillebridge v. Adie, 1 Mason, 234; Arnold v. Buffum, 3 Mason, 280; Cheeseman v. Wilt, 1 Yeates, 411; Robinson v. Adams, 4 Dallas Appendix xii.; Dunwoodie v. Reed, 3 Serg. & R. 440; Neave v. Jenkins, 2 Yeates 414; Way v. Gest, 14 Serg. & R. 40; Holmes v. Holmes, 5 Binn. 252; Wells v. Riter, 3 Whart. 208.*g*

“One having issue three sons, A, B, and C, devises his lands to his son

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A, after the death of his wife, to him and the heirs of his body lawfully begotten, in fee-simple; and if he die in the lifetime of his wife, that then his son C should be his heir, and dies. A hath issue, and dies in the lifetime of the wife. It was adjudged, that the issue should have the land after the death of the wife, and not C; for it is in effect a devise to the wife for life, remainder to A in tail, remainder to C in fee, upon the contingency of A's dying in the life of the wife, and does not abridge the estate-tail expressly given to A by his dying in the life of the wife.

Swinb. 116. *Qu.* If the wife has an estate for life by this implication? [It should seem she clearly hath.]

“*Cestui que use*, 12 Ed. 4, by will devises lands to B his son and his heirs for ever, provided, that if he die without issue, living his executors, that the land should be sold by his executors, and dies; then the executors die; and after, the devisee being dead likewise, the heir of his body brought a formedon, supposing it to be an entail: the tenant pleads *ne dona pas*; and upon the issue joined, the court was of opinion that it was no entail, &c.; and upon this, and some of the foregoing cases, was the following judgment given.

Dyer, 354 a, pl. 33.

“One having issue three sons, A, B, and C, by his will in writing devises lands to B, his second son, and his heirs for ever; and if B die without issue, living A, then A to have those lands to him and his heirs for ever. B enters, and suffers a common recovery to the use of himself and his heirs, and then devises those lands to the plaintiff and his heirs, and dies without issue, living A. It was adjudged, first, that B had a fee-simple by the devise to him and his heirs for ever; and that the other words did not so correct or qualify it, as to make it an estate-tail, not being, *if he die without issue generally*, but upon the contingency of his dying without issue, living A; so that if he survived A, or died in the life of A, leaving issue, A was to have nothing: and this being a contingency to happen within the compass of lives then in being, though the first devise was a fee, yet the limitation over, upon such contingency, was good, and not within the danger of a perpetuity; for the limitation to A is not a remainder directly, which cannot be after a fee, but it takes effect by executory devise, and upon determination of the first estate, by the happening of the contingency, carries over the land to the other. Secondly, it was adjudged, that this, being a mere collateral possibility, was not bound by the recovery, unless he to whom it was limited had been party by way of voucher; for it had no existence at all when the recovery was suffered, and therefore the recompense in value could not extend to it, any more than to a remainder limited to the right heirs of J S, who is then living; for though that remainder be carved out of the estate of the donor or lessor, yet it cannot then vest for want of a person capable to take it: or it is rather to be resembled to an estate to A and his heirs, so long as B hath heirs of his body, in which case a recovery suffered by A, shall not bar the possibility of the reverter to the donor, it not having any real existence as a reversion or a remainder, but only as a mere possibility: and, therefore, whoever comes into the land, takes it subject to such possibility, which, like an infection, sticks to it, and can no ways be drawn out without the concurrence of him who is to have the benefit thereof. And the reason why a recovery will not bar these contingent interests is, because the recovery will not bar any persons but such as are in being to make

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defence, because such persons are presumed to call in the warranty, and to receive a recompense from the warrantor.

Cro. Ja. 490; Palm. 131; 2 Roll. R. 216; 1 Roll. Abr. 611; (9), 835, pl. (2), 2 Roll. R. 426; Vaugh. 272; Pells v. Brown, 4 Mod. 283; Swinb. 124; 2 Leon. 111." || Vide Fearn, C. R., (7th ed.); Tenny v. Agar, 12 East, 253; Doe v. Wetton, 2 Bos. & P. 324.||

"So, where a man devised to A for life, remainder to B and his heirs, and if B die without heirs, then to A and his heirs; it is said to be ruled by Fleming, Ch. J., that if B die without heirs, A shall have the land. But this case seems to be no law, and is contradicted by another case which was stronger, and yet adjudged otherwise, where one devised lands to A and his heirs, and if he died before twenty-one years of age, then he devised the said lands to B, and died. A entered, and hath issue a daughter, and died before twenty-one: it was adjudged, that the daughter should have the land. So, where one limited an estate to a man and his heirs, and if he died without heirs in the life of J S, then to J D and his heirs; this was held a void limitation, though it was brought within the compass of a life in being: and that the lord should have it by escheat, per North, Ch. J.; for in this last case it was a direct limitation after a fee, and was not to abridge the fee at all, but only a provision, that if the fee were out in such a time, another should have the land, which would elude the statute of *quia emptores*, &c., and defeat the lords paramount of their seignories; and so for the first case, which is a direct perpetuity. But for the second case, it seems now to be law, and is within the reason of other cases, where such executory limitations in wills have been allowed good: therefore, where one devised lands to his wife for life, remainder to his son and his heirs; and if he died before his age of twenty-one years, then to remain to J S in fee; the son entered, levied a fine, and died before twenty-one; it was adjudged, that J S should have the land; because, say the books, it was a plain limitation.

Dyer, 4, in margin; 3 Chan. Cas. 22; Cro. Eliz. 142, Mills v. Snowball.

"But, where one devised lands to his son and heir, and if he died before his age of twenty-one years and without issue of his body then living, then to remain over; he survived twenty-one years, and then sold the land, and died; it was adjudged a good sale, because he had the fee presently; for the estate-tail was limited to commence upon a contingency subsequent, which did not happen.

1 Sid. 148; 1 Keb. 531, Collinson v. Wright; Cro. Ja. 695; *β* Lillebridge v. Adie, 1 Mason, 234; Arnold v. Buffum, 3 Mason, 208; Holmes v. Holmes, 5 Binn. 252; Wells v. Ritter, 3 Whart. 208.g

"One having issue four sons, devises lands to B (one of them) and his heirs for ever; and if he dies within the age of twenty-one years, or without issue, that then the land shall be equally divided between his three other sons: B hath issue, the defendant C, and dies within age; the three sons enter, and let to the plaintiff. It was adjudged *per totam curiam*, that this remainder, upon the contingency of his dying before the age of twenty-one years, was utterly void, having before given him a fee-simple; and then it is, as if the limitation were single, that if he died without issue, which explains the former limitation to him and his heirs, and shows what heirs the testator meant, and so makes it an entail. And two justices held, that if the remainder might begin upon the first limitation, yet, by the words and intent of the devisor, this cannot begin till the other

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part of the limitation be also performed, viz., that he die without issue; and that *or* shall be taken for *and*; for the words being *if he died without issue, or died within age, then*, &c. This word *then* shows the beginning of the remainder, viz., that it shall be, *when* he dies without issue, and not before; and so all one, whether it be taken as a copulative or a disjunctive. But this case seems not law now; for by the other cases it appears, that in case of a will, such limitation, even upon the first part, is good by way of executory devise. And there is a case cited in Rolle which seems to be the same case, and is reported only upon the first part of the disjunctive; and adjudged good, not as a condition, but as an executory devise. And as to the other part of the disjunctive, it is not taken notice of, because on the making an entail there could be no question of the remainder. And another case of one Oclie, 9 Eliz., is there cited, where a man devised lands to his grandchild and his heirs, with a proviso, that if he died before payment of such a sum, or before he came to the age of thirty years, that then another should have the lands; and adjudged, that upon the happening of the contingency the other should have the land.

Soule v Gerrard, Cro. Eliz. 525; *Moore*, 422, S. C. by the name of *Sowill v. Gerret*;" [*Walsh v. Paterson*, 3 Atk. 194, S. C. cited:] "2 Roll. R. 220; *Hoe v. Garrell*, Pal. m. 136; *Swinb*. 116; 2 Roll. R. 220."

"One having issue two sons, B and C, by divers venters, devises Blackacre to B and his heirs, and Whiteacre to C and his heirs, provided that if either of his said sons die before marriage, or 21, and without issue, then he gives his said lands, so given to such son who shall so die before marriage, or before twenty-one, and without issue, to such of his said two sons as shall survive the other, and dies; B marries, and hath issue a daughter, and dies; and after C attains his full age, and dies, without issue, before marriage. In this case it was adjudged, that B and C had no estate-tail, but a fee determinable upon the contingency of death before marriage at any time, or after marriage, and before 21, and without issue: so that if they were married under age, or attained full age, though not married, or had issue upon marriage at any time, the limitation over was not to take place, and then to the survivor for life only.

1 Roll. Abr. 835, *Hanbury v. Cockrel*; *Hardr*. 150, S. C. cited, *et que fuit Contingent Remainder. Quære?*" [Fearn, C. R., 393, (7th edit.) Butler.] "Vide the case."

"One makes a feoffment in fee to the use of himself and his heirs, and when JS pays such a sum of money, then to the use of him and his heirs; or when he marries such a woman, or when he comes to full age, then to the use of him in fee. This was adjudged a good remainder in fee upon the happening of the contingency, though in the mean time the feoffor had the whole fee-simple in him; or rather, this takes effect by way of springing use, as appears in the case of *Lloyd and Carew* hereafter mentioned.

1 Roll. R. 137; 2 Bulstr. 273, *Lady Russell's case*.

"One devised lands to his eldest son in tail, remainder to his youngest son in tail, remainder to his daughter in tail, and if they all died without issue, that the land should be sold by his executors. The eldest died without issue; then the youngest entered, and suffered a common recovery and died without issue; and the daughter likewise died without issue. It was held clearly, that the executors were barred, and could not make sale according to the will; for this was only a plain limitation or power to them to sell after the former estates-tail spent, and no contingency or executory

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devise ; and therefore was subject to be barred as other remainders expectant upon estates-tail are.

Mo. pl. 201.

“ One devised lands to A for life, and if he died without issue, then B should have the lands. In this case, A hath but an estate for life by express words, and therefore shall have no greater estate by implication against the express words ; but those words, *if he die without issue*, are only a condition, upon the happening or not happening whereof the remainder to B is to vest or not vest ; and, being used only for that purpose, seem to be confined only to his having no issue at the time of his death ; and then in the mean time the fee descends to the heir at law.

9 H. 6, 74 ; 20 Roll. R. 217 ; Palm. 134.” *β Shriver v. Lynn*, 2 Howard, 43. A condition annexed to the devise that the person who may have the right to the estate, is to procure an act of Assembly for the change of his name, together with his taking an oath before he has possession, “ that he will not make any change during his life in this my will, relative to my real property.” See Willis’ Lessee v. Bucher, 3 Wash. C. C. R. 369.*g*

“ So, where one devised lands to his brother B, and if he died, having no son, that the land should remain to C for life ; and if he died without issue, having no son, that it should remain to the right heirs of the devisor : by this will B hath an estate-tail, and C only for life, or at most but to him and the heirs female of his body. And the words, *having no son*, are a kind of condition precedent upon the fulfilling or failing whereon the remainder limited to his own right heirs is to take effect by the will ; for, if he had a son, he cannot die without issue ; and therefore it must be intended such issue as he may die without, though he hath a son, viz., issue female ; and if the words *having no son*, make the contingency, the other words, *if he die without issue*, may well create an entail female ; since there is no devise expressly for life, as in the other case, but only by construction of law. And if the words *die without issue* be not so construed, they are useless and idle. But one book says, that the son hath an estate-tail to the heirs male of his body. But *quære* of this.

Mo. pl. 939 ; Millinder v. Robinson, Swinb. 112, 113 ; 1 Roll. Abr. 837, (12) ; 4 Mod. 258 ; 1 Roll. Abr. 837, pl. 12. The same is also said in Moore’s Report.

“ Copyhold land is surrendered to the use of A and B, and of the longer liver of them, and for want of issue of B, of his body lawfully begotten, to remain to C ; adjudged, that B had but an estate for life by the words of the surrender, and then he shall not have a greater estate by implication in a surrender or conveyance, though in a will it would, perhaps, be otherwise ; therefore the words, *for want of issue*, are the condition upon which the remainder to C is to arise or not arise. And so it is, if a lease be made to A for life, and if he die without issue, that it shall remain to B, &c.

Cro. Car. 366 ; 1 Roll. Abr. 839, (7) ; Vaugh. 261, *Seagood v. Hone*. Vide Allen v. Nash, 1 Brownl. 127 ; 1 Mod. 52.

“ One devises lands to his son A and his heirs, and devises other lands to his son B and his heirs, and that the survivor of them shall be heir to the other, if either of them die without issue. This makes an estate-tail, and not a fee determinable upon their respective deaths without issue ; because such dying without issue is not confined to any time. And though it was objected that these words are useless, because if one died without issue, the other would be his heir of course, and then the fee given by the first words should stand, yet it was adjudged *ut supra*, because *non constat*,

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but that he might have other children who might be heirs to them. Note: the book says the other children by the venters. But *quære* of that, for they could not be heirs to them.

Cro. Ja. 695, Chadock v. Cowley;” ||Fearn, 243, (7th edit.)||

“One having a wife, a son, and three daughters, devises lands to the son after the death of the wife, and if the three daughters survive the wife, and the son, and his heirs, then to them for their lives. This is a good remainder to the daughters, and the son hath but an estate-tail; for if he should have a fee then the remainder would be void and idle, for they cannot survive him and his heirs, unless it be meant heirs of his body, for they themselves would be his heirs, and consequently cannot survive themselves; therefore it must be, such heirs as they may survive, that is, heirs of his body, which in a will gives him an estate-tail by implication. So, if a man hath issue two sons, and devises to the youngest and his heirs, and if he die without heirs, to the eldest in fee; this makes an estate-tail in the youngest, because otherwise the remainder would be void, the eldest being heir to him. And the diversity is, when such remainder is limited to him who will be heir, there, by a necessary implication, by the word *heirs* in the first part of the devise must be meant *heirs of his body*, and where such devise is over to a stranger, which carries no such necessary implication in the first part of the devise, it makes the remainder void and against law.

Cro. Ja. 415; 1 Roll. R. 398, 436; 8 Bulstr. 192; Webb v. Herring, Cro. Car. 58; Swinb. 122; accord. *per* Cro. and Yelverton v. Richardson, who held it a fee; but Vaugh. 270; holds with the other opinion. 2 Roll. R. 423; Swinb. 111, 120;” ||*Acc.* Doe v. Bluck, 6 Taunt. 485.||

“If an alien be made denizen, and lands be given to him and his heirs, remainder over to another; or to a bastard and his heirs, with such remainder over; these are good remainders, and the denizen or bastard have only an estate-tail to them and the heirs of their body, because they can have no other heirs inheritable.

3 Bulstr. 195; 1 Roll. R. 436.

“One having issue two sons, B and C, and two daughters, devises lands to C in tail, if he should live to his age of 24 years, upon condition that he should pay 100*l.* to his two daughters; and if C died without heirs, then if B did not pay the said 100*l.* that it should remain to his daughters and their heirs. And whether this was a condition for breach whereof the heirs should enter, or a limitation, that for non-payment would carry the lands to the daughters, was the question? And it was adjudged a condition, and that for breach whereof B, the heir, should enter. But this judgment being in C. B. was after reversed in error in B. R., as appears in Rolle, where the case is put somewhat different; for there, after the devise to C, &c., it goes on, *and if C dies before 24*, (not saying without heirs, which, in this case, would give him an entail, the limitation over being to B his brother, who would be his heir for want of issue,) *then I will that B, my son and heir, shall have the said lands to him and his heirs, he paying as C should have done; and if C and B do not pay, then to the daughter*, &c.: it was held, that for non-payment by C, B should be in by limitation, and not by the condition, for then it would defeat the portions to the daughters, and the future devise to them too; and therefore the judgment which was given was reversed.

Cro. Eliz. 376, Baldwin v. Wiseman;” [Owen, 112, S. C.; Gouldsb. 152, pl. 90, S. C.;] “1 Roll. Abr. 411, pl. 5.”

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“Copyholder surrenders to the use of A and his heirs, upon condition to pay 100*l.* to B, and if he fails, that it shall be to the use of B: if this was a good limitation to B, so as there should be a fee upon a fee, was the question? And Beaumont thought that it was good enough, and should be as a use limited upon a feoffment; so these executory uses arise out of the first surrender, and executory uses may carry a fee after a fee as well as executory devises.

Cro. Eliz. 361, *Paulter v. Cornhill*.” ||Vide *suprà*, 361, and note; and *Fearne*, 277, (7th edit.)||

“A, seised of lands in London, where by custom they may devise in mortmain, erects an alms-house, &c., and then devises the said lands to six persons and their heirs and assigns, upon condition and to the intent to pay out of the issues and profits thereof certain annual sums to the poor there, &c.: and if any part of the said purposes remain unperformed, then he devises the said lands to B and the heirs male of his body, upon condition and to the intent to perform all the said trusts; and if he fails for two months, then he devises the said lands to the mayor and commonalty of London upon the same conditions; and if they fail, that then his heirs should enter and perform the same; and dies. The devisees enter, and for breach of the condition, the heir enters, and then one C enters, and gets a bargain and sale from the first devisees of their parts, and levies a fine with proclamations, and long after the mayor and commonalty, having notice of the will, entered, upon whom C re-entered, &c.; and the court held clearly that, admitting these limitations good, they were barred by the fine and proclamations; but they inclined, the mayor, &c., could take nothing by the will, the devise to B being but a possibility; and if the devise over to the mayor, &c., should be good, it would be a possibility upon a possibility, which the law will not allow. But *quære*, if there were twenty possibilities one after another, yet, if they were limited to take effect within the compass of lives then in being, or a reasonable time after, they might not be allowed, since then there could be no inconvenience urged therefrom, which is the great argument upon which they have been condemned.

Cro. Car. 575; 1 Jo. 452; *Mayor and Commonalty of London v. Alfred*.” ||Vide *Fearne's C. R.* 251, (7th ed.)|| “3 Mod. 29.”

“One having issue two sons, A and B, by his will devises Blackacre to C his wife for life, and after her death to B and his heirs in fee, under the conditions after declared, and devises Whiteacre likewise to his said wife for life, and after her death to A and his heirs, under the condition after limited; and if C his wife died before the legacies paid, then he willed that they should be paid by A and B out of the lands given them, and *if either of my sons die before they enter, or before the legacies paid, then I will that the longer liver shall enjoy both parts to him and his heirs; and if both die before they enter, then my executors, or one of them, to take the profits till they be paid.* A year after the testator dies, C enters. A by deed releases to B all his right, &c., with warranty; B devises Blackacre to D his wife, and dies in the life of C, and before the legacies paid; then C dies, and A enters into Blackacre; and if this entry was lawful, was the question? One point was, if this limitation of a fee after a fee were good; and *Pell and Brown's case* was cited to show that it was, and that it should operate as a future executory devise; as, when one devises, that if

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his son and heir die before marriage, or twenty-one, that then J S shall have the land, this is good as an executory devise. But this point was not adjudged; because they all agreed, that be it a condition or not, the release of A *has discharged it*, as in Lampett's case, and that this *was without question an interest in A*, though not executed; and this release with warranty bars A. And the devise of Blackacre to B is upon condition, and this descending upon A is without question barred by his release. Note: these limitations seem to be all good for the reasons mentioned in the preceding case; but *quære*.

Hutton, 60, Howell v. Anger; Co. 1048, Lampett's case; Cro. Eliz. 803, Brome v. Car.

“One having three sons, A, B, and C, and being seised of copyhold lands which he had surrendered to the use of his will, devises Blackacre to A, Whiteacre to B, and Greenacre to C; *and if the said A, B, or C live till they be of lawful age, and have issue of their bodies lawfully begotten, then I give the said premises to them and their heirs in manner aforesaid, to give and sell at their pleasure; but if it fortune one of them to die without issue of his body lawfully begotten, then I will that the other brother or brothers have all the said premises in manner aforesaid; and if it fortune the third to die without issue in the like manner, then I will that the said premises be sold by my executors, and the money given to the poor.* The testator dies: A, B, and C are admitted to their parts; A attains full age, and hath issue: A surrenders his part of the whole to the use of B and his heirs, who is admitted accordingly: B attains full age: then A dies, and B dies without issue. It was adjudged, that no estate-tail was created by his will, but the fee-simple vested and settled in them when they came to their lawful age and had issue; and that the words, *if they live till, &c.*, are words of condition, and no implication to make an estate-tail, and then the disposition over upon such condition, &c., viz., *if the third died without issue*, is void, being not confined to any time certain; and therefore as to C's part, he dying within age, and without issue, this came to A and B; then A living to full age and having issue, his surrender of Blackacre and the moiety of Greenacre to B was good; and when B after died without issue, though of full age, yet, as to his own part, which was Whiteacre and the moiety of Greenacre, this belonged to the heir at law of the devisor, (the executors who should sell being dead before.) But, as to Blackacre and the other moiety of Greenacre, these belonged to the heirs of B, as being A's part, who lived to twenty-one, and had issue, and therefore had the fee, and by his surrender to the use of B made B a good title thereto, which belonged to his own heirs, and not to the heirs of the devisor.

2 Leon. 68; 3 Leon. 115, Brian and Cawsen;” ||Fearne, 277, (7th edit.)||

“One having three sons, A, B, and C, and also three daughters, and being seised of Blackacre, Whiteacre, and Greenacre, devises all to his wife for life, and after her death that Blackacre be to A, Whiteacre to B, and Greenacre to C; and if one or two of his sons die, that then his or their parts should be to the survivors; and devises to his three daughters 10*l.* each, to be paid out of his lands by every of his sons, as soon as they should enter their parts, after the death of the mother, provided *that if it fortune any of my said sons to marry and have issue before he enters his part, then I will, that his part shall remain to the heir of his body, and not*

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to remain to his other brothers as aforesaid. The testator dies; then the wife dies, and the sons enter, and after B dies having issue the defendant; and then A dies, having issue the plaintiff. It was adjudged for the plaintiffs, for the first words gave them but an estate for life, and the last clause gives no estate-tail, unless they had issue and died before entry, which is a condition precedent to the vesting of the tail; and though 10*l.* apiece be devised to be paid out of their parts, yet that shall not enlarge their estates by implication against the express words.

Cro. Eliz. 497; Mo. pl. 656, *Bacon v. Hill*;" *β Robinson v. Adams*, 4 Dall. Append. xii.; *Dunwoodie v. Reed*, 3 Serg. & R. 440.*g*

"A seised of lands in fee, having a brother named B, who had issue C and D his sons, and E his daughter, by will devises to B his brother, if he were living at the time of his decease, and his heirs; and if C were living at the time of his death, and B then dead, then he devises to C and his heirs; and after devises to D in the same form; and if no issue male be left from B, and that E daughter of B survive, and outlive B, C, and D, and it should happen she only should be alive at the time of his death, then he gave to her and her heirs; *and if B, C, D, and E die, so as no issue remain to B, then I will that F (a stranger) shall inherit as aforesaid,* be it that it happen my said brother B to die without issue, either before my death, or at any time after, and dies. B survived him, then C died, leaving issue two daughters, the plaintiffs, and after B died; and if D or the daughters of C should have the land, was the question? and the better opinion seems for the daughters; for when it was devised to B and his heirs, if he were living at the time of the death of A the deviser, and he was so living, though these words give him a fee upon the happening of the contingency, viz., his surviving A, and so to the others; yet, by the words after, if B, C, D, and E die without issue, either before his death or after, generally, without confining such dying without issue to any time certain, these words, in a will, plainly show what heirs of B, and so of the rest, the testator meant, viz., the issue of their bodies generally, and so make an estate in tail general to B, and by consequence it must go to the daughters of C, his son and heir, before it can go to D or E, the youngest son and daughter of B, or to F. And the words, *if no issue male be left of B*, do not give an estate in tail-male so as to go to D the youngest son, upon the death of C without issue male of B, and to be fulfilled in the life of A the testator before the devise to any of them can take effect; and, by consequence, cannot operate to qualify any estate before given, because no estate is before given that can take place till after the death of A the testator, though they operate to make the vesting of the remainder to E contingent, and to take only upon failure of issue male of B in the life of A the testator; and then the first devise to B and his heirs, if he be living at the time of the death of A, can be restrained and qualified only by the last clause, which gives it to K, in case B, C, D, and E die, so as no issue be left to B, *be it that B die without issue, either before or after*, which words give an estate in tail general to B by implication, and, by consequence, the daughters of his eldest son are to be preferred, and D and E can only come in after either, by virtue of the limitation made to them immediately, or as the next branch of the issue of the body of B. And if it had not been for the last clause, which governs and goes through all the preceding limitations, then by the first clause, which gives it to B and his heirs, if he were living at the death of A, the whole fee would have vested

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in B upon the happening of that contingency, and, by consequence, all the limitations after which were to arise, but upon failure of the first, would have been prevented and destroyed: and it is, in effect, no more now than, a devise to B and his heirs, if he survive the testator; and if he die without issue, either in the life of the testator, or after his death, then to F, &c., which is a plain entail, and the remainders are all good, for all the contingency that is in the case is precedent to the vesting of any estate at all; and had it not been for the last words, *be it that B die without issue*, the limitation over to F had been totally void, and whichsoever of the devisees had been living on A's death had taken the whole fee. And if the words, *if no male issue be left of B*, should create an estate in tail-male to B, then the words after, *be it that it happen B to die without issue, either before or after my death*, would not enlarge the estate in tail-male before given, and make it an estate in tail general to give it by way of remainder to the issue female of B, as has been adjudged; and so the issue female would be quite excluded, which would be against the intent of the will, which was, that F should not take till the failure of issue of B.

2 Keb. 189, 192, 261, *Wright v. Hiccocks*;" *β Neave v. Jenkins*, 2 Yeates, 414. *g Dyer*, 171; "Mo. 13, *Frencham's case*."

"A, seised in fee, makes a feoffment in fee to the use of himself for life, remainder to the feoffees for 80 years, if B and C his wife so long live; and if C survive B, then to the use of C for life, and after her death to the use of the first son of B and C in tail; and for default of such issue, to the use of D and E, and the heirs of their bodies, remainder to the right heirs of A; then A dies, and C dies, leaving a son, who dies without issue, and thereupon D and E enter and make a lease to the plaintiff, upon whom the defendant, as son and heir of A, enters: and if the remainder in tail to the first son of B and C, and the remainder to D and E were executed, or were contingent upon the estate for life to C, was the question? and adjudged, that they were executed and not contingent; for though the estate for life to C was contingent, viz., if she survived her husband; yet this shall not hinder the vesting of the remainders limited after, but they shall take place in the persons *in esse*; and when that contingency happens, they, being limited by way of use, shall open to let in the contingent remainder to the wife. And a case is there cited of the Earl of Derby, where a feoffment was made to the use of A in tail, remainder to the feoffees for eighty years, if B so long live; and after his decease, to the use of C, and the heirs male of his body, remainder to the use of D; and adjudged, that the remainders vested presently, and that the possibility of B's outliving the eighty years, and so there would be no particular estate to support the remainders, which are not to take effect till his death, that yet this possibility would not make the remainders contingent. *Quære* of these cases.

Hutt. 118, *Napper v. Saunders*, Earl of Derby's case." [So, it was said by Hale, C. J., in the case of *Weale v. Lower*, (Pollexf. 67,) that if a feoffment be made to the use of A for 99 years, if he shall so long live, and after his death to the use of B in fee, this shall not be contingent, but it shall be presumed his life will not exceed 99 years; but that it had been otherwise, if it had been made but for 21 years. In a case of this nature in Chancery, (*Beverly v. Beverly*, 2 Vern. 131,) where A devised lands to B his eldest son for the term of sixty years, if he should so long live, and from and after his decease to his grandson D, (son of the said B,) in tail. B and D suffered a recovery; an objection was taken to the recovery, for that the devise to B being only for sixty years if he should so long live, and after his decease to D, the

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freehold during the life of B was in abeyance. It was argued that the limitation of the estate-tail was good, expectant on the term of sixty years; and Lord Derby's case was cited as in point, that the devise over, from and immediately after the decease of B, ought to be intended of his dying within the term; which was highly presumable, B being then upwards of forty years of age. But the court said, it would be hard to make such construction on the words of the will, as to say, where land is limited to a man for sixty years, if he shall so long live, and from and after his decease to another, that it must be meant from and after his decease *within the term*; for supposing he outlived the term, should the remainder-man take in the lifetime of the first devisee? That would be a construction contrary to the words and intention of the testator. Vide Fearn's C. R. 22, (7th edit.)]

"A, seised in fee, having issue two sons, B and C, devises lands to B for fifty years, if he should so long live, and after the determination thereof, then to the heirs male of the body of B; and for want of such issue to C in tail, remainder to his own right heirs, and dies; B enters and suffers a common recovery, to the use of himself for life, and to the heirs male of his body, remainder to the defendant and his heirs, and then dies without issue: C enters, and if B had an estate-tail was the question? for then the recovery barred that, and the remainder to C. It was argued for C, that B had no estate-tail; for, first, he having but an estate for years, this cannot so close with the remainder to the heirs male of his body as to make an estate-tail in himself. Secondly, he shall not have an estate for life by implication to make out such an entail, because he hath an estate but for years by express limitation; and without an apparent intent of the testator, no other estate shall be raised by implication. Thirdly, this cannot be good by way of remainder to the heirs male of his body, because this would be a contingent remainder of the freehold and inheritance, which an estate for years is not sufficient to support. Therefore, fourthly, this is an executory devise to the heirs male of the body of B; as if one covenant to stand seised for twenty years, remainder to the heirs of the body of the covenantor, this is an executory remainder, and not to be barred by a common recovery. For the defendant it was urged, that such construction ought to be made, that all the will may take effect; and it is a known rule in law, that it shall never be construed an executory devise, if it will admit of any other construction; and therefore this shall be construed an estate-tail in B and an estate for life, raised by implication to him by reason of the words, *for want of such issue*, which of themselves make an estate-tail in a will. And there is no difference, whether those words follow an estate for life or years, if the limitation be to the heirs. And now B being heir at law, so much of the old inheritable estate shall arise to him by implication as may make him tenant for life, and then he hath an estate-tail executed in him; and to construe it an executory devise would be to introduce a perpetuity above the power of a common recovery to dock; and the court held—This could not be good as an executory devise, for then the limitation over would be void: (*quære* of this reason?) therefore it must be a contingent remainder, and then it is void, because the estate for years is not sufficient to support it. Note; then it follows, that afterwards judgment was given for the plaintiff, viz., C, which proves, that they held it no estate-tail in B; for then, by the recovery, that and the remainder to C would have been barred, and, by consequence, it would have been adjudged for the defendant who claimed under the recovery. Secondly, This proves that it was held an executory devise, if the reason there given be good, that then the remainder over would be void; which I should think is a *non sequitur*; for if it were an executory devise to the

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heirs male of the body of B, yet it would only give them an estate-tail, which will bar a remainder over ; but being a contingent remainder, and B having only an estate for years, the recovery was a forfeiture of B's estate for years, whereof C, who was next in remainder, for want of issue male of B, may at any time take advantage by entry.

4 Mod. 255 ; 1 Salk. 226, *Goodright v. Cornish*." || *Vide Cholmondeley v. Clinton*, 2 Mer. R. 229 ; *Fearne*, 282, 533, (7th ed.) ; || "4 Leon. 21."

β Where a contingent estate is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall not be construed an executory devise but a contingent remainder.

Dunwoodie v. Reed, 3 Serg. & R. 441.*g*

"The last case I shall here mention, to show how far a limitation after a fee has been carried, was, in short, but thus : A and B, two sisters, seised of lands in fee for 4000*l.* paid A by C ; and in consideration of a marriage intended, and afterwards had between B and C by lease and release, convey all their lands to the use of B and C for their lives, remainder to their first and other sons in tail-male successively, remainder to the daughters of B and C in tail, remainder to the right heirs of C, provided that if there be no issue between B and C living at the death of the survivor of them, and that the heirs of B should, within twelve months after the death of B and C, dying without issue as aforesaid, pay to the heirs or assigns of C 4000*l.*, then the remainder in fee so limited to C and his heirs should cease, and that then the premises should remain to the right heirs of B for ever. Afterwards B and C, for extinguishing any other right or title which B or her heirs then had, or after might have, by any settlement, proviso, &c., on payment of 4000*l.* or otherwise to the heirs of C, levy a fine of the said lands to the use of C and his heirs, and direct the trustees of the first settlement to convey accordingly : then C devises the said lands to D his brother, subject to his debts, which were near 5000*l.*, and after B and C die without issue, and A, the sister and heir of B, brings a bill in Chancery against D, the brother and heir of C, and against the trustees, to have the conveyance of the lands, on payment of 4000*l.*, pursuant to the proviso. And this bill being dismissed, an appeal was brought in parliament, and for the defendant or respondent it was insisted, that the proviso was void, the fee being before limited to C and his heirs, and so not capable of a further limitation, unless to happen in the life of one or more persons in being at the time of the settlement, which is the furthest the judges have ever gone in allowing contingent limitations upon a fee ; and if they should be extended to contingencies to happen within twelve months after the death of one or more person or persons in being, they may as well be extended to contingencies to happen within 1000 years, and so all the inconveniences of a perpetuity will be let in, and the owner of the fee-simple, thus clogged, will be no more capable of providing for the necessities and accidents of his family than a bare tenant for life. Secondly, if this limitation were good, then the estate limited to the heirs of B were virtually in her, and her heirs must claim by descent from her, and not as purchasers ; and then that estate is barred by the fine, the design of limiting such power to the heirs not being to exclude the ancestor ; but because the power could not, in its nature, be executed till after the death of the ancestor, it being to take effect upon a contingency that was not to happen till after that time, and that, by this means, C would not only have no por

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tion with B, but D, his brother, would lose all the money he paid for the debts of C, which were charged on the said lands. For the appellants it was urged, that the proviso was not void, that it was within the reason of the contingent limitations allowed in the Duke of Norfolk's case, where it is said that future interests, springing trusts, or trusts executory, and remainders that are to arise upon contingences, are quite out of the rule and reasons of perpetuities, if they are not of remote consideration, but such as will speedily wear out: that though there can be no remainders limited after a fee-simple, yet there may a contingent fee-simple arise out of the first fee: that the *ultimum quod sit* of a fee upon a fee is not yet plainly determined; that there could not, in any reason, be any difference between a contingency to happen during a life or lives in being, and within one year after, the reason of allowing them to be good, if confined to lives in being, or upon their extinction, was because no inconvenience could follow; and the same rule will hold to a year after: and that the true rule to set bounds to them is when they prove inconvenient, and not otherwise; that this settlement was made by good advice. Secondly, that the fine could not bar the benefit of this proviso, because the same never was nor could be in B who levied it; and the decree of dismissal was reversed. Note; Mr. Pooley, who argued this case, added also this reason, that if the proviso had been, that if B die without issue living at the death of the survivor of them, then if the heirs of B do, upon the death of such survivor without issue, pay 1000*l.* to the heirs of C, then, &c.; this, you agree, had been good, but being extended to a year after, it is otherwise, and may as well be 4000 years after: to this he said, if the proviso had been so worded, it would have been impossible to have been performed; for then the heirs of D, who could not be known till her death, would have been obliged to have carried always 4000*l.* about them ready to pay, and to have the heirs of C, who likewise could not be known till his death, always ready to receive it upon the instant of the death of the survivor. And it might happen, that neither the one who was ready to pay it, nor the other who was ready to receive it, might be heirs of B and C; and surely when the heirs of neither could be known till their deaths, twelve months was but a reasonable time to procure and pay so great a sum as 4000*l.* Which argument shows, that the limitation of a fee after a fee upon a contingency, to happen within one or more life or lives in being, or upon their deaths, being allowed to be good, may be extended further, when, as the limitation may happen to be, it would be inconvenient, and impossible to be performed within such a time; and that inconvenience is to be the only bound to these limitations. But here it is so far from being inconvenient, that it would be inconvenient and impossible to be performed otherwise.

Cases in Parliament, 137, Lloyd and others v. Carew;” [Ferne, C. R. 275, 432, (7th edit.);] “3 Chan. Ca. 31, 32, 36.” [The rule is now settled, that the contingency for the springing up of future and executory estates must not be more remote than the compass of a life or lives in being, and twenty-one years after, with a sufficient number of months for the birth of a child *en ventre sa mère*. Ferne, 429, (7th edit.); 12 Ves. 232. The rule formerly was more strict, and seems to have been first settled with this latitude in 1736, in the case of Stephens v. Stephens, 2 Barnard. 375; 2 W. Kel. 168; Forrest, 228. Vide Mr. Hargrave's elaborate history of Executory devises in Thellusson v. Woodford, 4 Ves. 254.]

“Husband seised of lands to the use of himself and his wife, and the heirs of the husband, by will devises thus: *The lands which are A's for*

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life, I devise them to the heirs of the body of my wife, if they shall be of the age of fourteen years at her death. The devisor dies without issue: the wife hath issue by a second husband: then she and her husband suffer a common recovery; and then the wife dies, the issue being about fourteen years of age. And two questions are made: first, if this devise to the heirs of the body of the wife was good? And in this case the court was divided; for by the two justices this is void, being a present devise to the heirs of the body of the wife, who being alive could not have heirs: and so it is, as if a devise were to the heirs of J S, who is living, which is clearly void. And though J S had an estate for life, as the wife had here, yet the devise would not be good, because it is not by way of a remainder, but is a distinct present devise. And it was said, that this was a contingency upon a contingency; viz., if the wife should have heirs of her body, and also if they should be fourteen years of age at her death; and therefore not to be allowed. But it was held by two other justices, (and, as it seems, it is the better opinion,) that the devise was good as an executory devise. They agreed to the case of the devise to the heirs of J S though he had an estate for life, because intended a present devise without other words; but when the intent appears, that it shall take effect *in futuro*, it is otherwise. And here the devisor recites, that the lands were his wife's for her life, and therefore he did not intend the devise to take effect till after her death; as, when lands are devised to A after the death of B, or to the heir of J S which shall be born, these are good executory devises, and the land shall descend in the mean time to the heirs at law of the devisor. So, a devise to a person that shall marry his daughter, &c. And in case of executory devises, it is not necessary there should be a devisee *in esse* at the death of the testator; and the contingency is frequent and ordinary, and confined to one life, and so not within the danger of a perpetuity, as it would be if it were after such a one's death without issue. And all the court held clearly, that if the devise were good at all, it must be as an executory devise, and not as a remainder; for though the wife hath an estate for life, yet this is a new original devise, to take effect after her death, and not as a remainder joined to her estate. Also, as to the second point, all held that if this was an executory devise, it was not barred by the common recovery, according to Pell and Brown's case; for it hath no existence at all till the contingency happens, and therefore there can be no recompense in value, for a valuation cannot be put upon that which is not.

1 Lev. 135; 1 Sid. 153; Raym. 162; 1 Keb. 567, &c., *Snow v. Cutler*. "β Devise "to the first heir male of J S, when he shall arrive at the age of 21 years, he paying to A and B, daughters of J S, 40*l.* each." After the devisor's death, J S had a son who attained the age of 21 years, and paid his sisters the 40*l.* each. Held, that the son was entitled to recover. *Lessee of Ashton v. Ashton*, 1 Dall. 4*g*. || It is a rule that the estate supporting, and the contingent remainders supported, must both be created by the same instrument. *Fearne*, 301. And the great distinction between a contingent remainder and an executory devise is, that the latter cannot be barred or destroyed by any alteration in the estate, after which it is limited. *Ibid.* 416, (7th edit.)||

“Husband seised of lands in fee, in right of his wife, he and his wife by indenture covenant to levy a fine to the use of the heirs of the husband upon the body of the wife to be gotten, remainder to the right heirs of the husband: the fine is levied accordingly, and after they have issue a son, who died without issue in the life of the baron and feme; and then the feme dies; and after the husband dies without issue: and if the heirs

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of the husband or the heirs of the wife should have the land, was the question? And for the heirs of the husband it was argued, that this settlement being by way of use, was like a will to be construed according to the intent of the parties: and there the husband would have an estate for life by implication, which being united to the estate limited to the heirs of his body, it would make an estate-tail in him: and for this was cited *Pibus v. Mitford*, where upon a covenant to stand seised to the use of the heirs male of his body, on the body of his second wife, it was adjudged, that this limitation carried an use to himself, in whom all his heirs were included; and therefore he, having an estate for life by implication, till the future use came *in esse*, made the whole an estate-tail in himself: so here. And though the estate here was the wife's, yet such use to the husband might well arise by implication, because both joined in the deed and fine, though it could not result back to the husband, because he had none before. Besides, it was urged that he had an estate for life as tenant by the curtesy. Secondly, if no estate arises to the husband by implication, yet it should be good to the heirs of his body by way of springing use, and the estate, in the mean time, should remain in the feme and her husband, till the death of the husband: and that it was no more than if the deed had declared the use after twenty years, or other future time, to the heirs of the body of the husband. But on the other hand it was argued, and adjudged, that here being no particular estate to support this last remainder, it was void, and then the fine was to the use of the wife and her heirs, she being owner of the estate: that here was no particular estate was plain, because the heirs of the body of the husband were limited to take presently, and that during his life they cannot do. Secondly, If it was intended the heirs of the body of the husband should take *in futuro*, that there must be an estate somewhere to support the limitation till it could take effect; that here was no such estate to the husband expressed; and implied it could not be, for if an yestate should arise by implication, it must be to the wife who was owner of the whole; and then, she dying before her husband, there again an estate was wanted to support the remainders during his life. That this was a case of a deed executed in the life of the parties, and not of a will where large allowances are made in favour of supposed intentions by reason of persons being surprised by sickness and wanting counsel; but the rules of law always govern in construction of deeds. That the notion of a springing contingent use is hardly intelligible in itself, and by no means applicable in this case; because no words here have a relation to a future time or contingency; and to allow such limitations in deeds, would make them as uncertain as wills, create intentions not expressed, raise uses by implications never intended, and in short destroy all the difference between good and bad conveyances; produce a confusion in property, and render all purchases unsafe and precarious. And therefore the judgment for the heirs of the wife was affirmed.

4 Mod. 153; Cases in Parliament, 104, *Davis v. Speed*;" [Fearn's C. R. 48, 284, (7th edit.); "1 Mod. 98, 121, 159, 226, 237; 2 Mod. 207; 1 Leon. 75; Raym. 228, 318; 3 Keb. 129, 139; 1 Roll. R. 240."

"One having issue a son who was heir apparent, and two daughters, devises in these words, *If it happen my son B and my two daughters to die without issue of their bodies lawfully begotten*, then all my lands shall be and remain to my nephew D and his heirs for ever. The devisor dies,

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and it was held, that here was no express estate given ; nor was there any by implication ; because then it must be either a joint-estate for life, with several inheritances in tail, or several estates-tail in succession one after another. The last it cannot be, because uncertain which shall take first, which next. And the first it shall not be, because the heir at law shall not be disinherited without a necessary implication, which in this case there is not : for it is only a designation and appointment of the time when the land shall come to the nephew ; as if he had devised thus : *I leave my land to descend, or I give my land to my son and his heirs, till he and my two daughters die without issue, or so long as any heirs of the body of him and my two daughters shall be living ; and then, or for want of such heirs, I devise the same to my nephew* : this is good as a future and executory devise, and in the mean time the land shall descend to the heir at law, he having made no disposition thereof. So, a devise that J S shall have his lands after 20 years, &c., is good for the same reasons.

Vau. 259, 261, 270, 271, Gardner v. Sheldon.

“ One by will devises thus : *I give to my daughter A my lands in B, if my son C happen to have no issue male, after the death of my wife ; and if my son C have issue male, then the said A to have 5l. only in lieu of the said lands ; and dies : C hath issue male : the wife dies ; and after that, the issue male dies without issue ; and then C dies ; and one doubt was, if A should have an estate for life by the devise, because at the time of the death of the wife, C had issue male, though that issue after failed, viz., If this was a remainder to A or a contingent or conditional devise ? And it was said, (a) that if I devise lands to J S, if my son die without issue, that this is a conditional devise, and J S hath nothing till the contingency happens. (But *quære* of that case, for that devise tends to a perpetuity, and therefore is not to be allowed ?) And the court were of opinion, that the devise was conditional, and that C having issue male at the time of the death of the wife, A is only to have the 5l. and not the land. Note also : Keeling was of opinion that this was an estate-tail in C ; but Twisden *contra*, that nothing was given to C more than a mere stranger. And this seems most consonant to the cases before mentioned. And then it was no more than an executory devise to A, if the son died without issue, which gives no more estate to the son than if he were a stranger ; nor alters any estate which the law gives him if he were heir at law. But by reason of the words, *If he have no issue male after the death of the wife ; and if he have, then A to have 5l. only* ; these words make the executory devise to A conditional ; and in this case the son having issue after the death of the wife, whereby the 5l. became due, A cannot after have the land, though that issue fails ; because a recompense was provided for each side of the contingency ; and when one has taken place, the other is shut out, as if it had not been mentioned.*

2 Saund. 111 ; 1 Sid. 445 ; 2 Keb. 600, Allen v. Rivington. (a) *Suprà*.

“ A hath issue B her son by a first husband, and C and D her son and daughter by E a second husband. F the brother of A being seised in fee of lands, devises them to A his sister and heir for so long a time, and until her son C should attain his full age of twenty-one years, and after he shall have attained his said age, then to him and his heirs for ever, and if he die before his age of twenty-one years, then to the heirs of the body of E, and to their heirs for ever, as they should attain their respective ages of

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twenty-one years. F dies, and C dies, and the question was, if B as heir to A, or D either as heir to C her brother, or as heir of the body of E, should have the land? And for B it was argued, that nothing vested in C till he attained twenty-one, but the freehold and inheritance in the mean time descended to the heir at law of F, for A had but an estate for years, viz., till C attained twenty-one; then A having but an estate for years, and C nothing till twenty-one, the fee must in the mean time descend to the heir at law of F, and there it shall continue, because the contingency never happened, C dying before twenty-one. Also, the devise to C being but contingent, viz., if he attained twenty-one, the estate for years of A was not sufficient to support it; and for that reason it was void. And D cannot take as heir of C, and then the land descends to the heir at law of F. Secondly, D cannot take by the devise to the heirs of the body of E; for admitting it to be an executory devise, yet E her father being alive when it was to vest, there is no person within the description to take it, for *non est hæres viventis*; and there also it descends to the heir of F, which is B the plaintiff. But for D, the defendant, it was argued, that the fee vested presently in C, there being only an estate for years in A; and they relied upon Boraston's case, where was a like devise; and there, from C it descended to D as his sister and heir. Secondly, If not as heir to him, yet as heir of the body of E by way of executory devise, which needs no particular estate to support it; for though E her father was living at the death of C, yet he was dead before D attained twenty-one, when only she was to take; and the estate in the mean time descends to the heir at law of the devisor; and without making it an executory devise it would be void, being limited after the fee to C, and therefore it cannot be good as a remainder, but the estate of C which was vested, being now divested by virtue of the original condition, he dying before twenty-one, it returns to the heir at law of the devisor till the full age of the heir of E, and until E's death, though it be after their full age, and then it is carried over to the heir of C by virtue of the executory devise.

2 Mod. 289, Taylor v. Byddall." ||Fearn, 432, 520, (7th ed.); Stanley v. Stanley, 16 Ves. 491; ||"3 Co. 19, Boraston's case."

"A, tenant for life, levies a fine *come ceo*, &c., to the reversioner, to the use of the conusee and his heirs, upon condition to pay to A 4*l.* annually, and that for default of payment it should be to the use of A for life: the conusee makes a feoffment over, and then there is a default in payment of the 4*l.* And if by this feoffment the future use was destroyed, was the question? And *per cur.*—It is not: for this is a charge or burden upon the lands, which goes with the lands into whose hands soever they come. And one judge thought that it was a condition, being to arise to the conusee himself who levied the fine; but if it had been to have arisen to a stranger upon condition, the non-performance thereof would have created a springing use to him, for it is merely a tie and charge upon the land which is not destroyed by the feoffment.

Cro. Eliz. 668; Smith v. Warren."

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"It is a maxim frequently urged in our books, that a remainder cannot be created to begin upon a condition annexed to the first estate, but that for breach of the condition the feoffor or lessor must enter, and by that entry, the first estate being determined, the remainder is destroyed, be-

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cause it cannot take effect at the instant of the determination of the particular estate. For the remainder passing out of the feoffor or lessor at the same time that the particular estate is created, and being to take effect in virtue of the first livery, when the feoffor or lessor re-enters for the condition broken, that destroys the force of the first livery, being an act of equal notoriety therewith, and then the remainder which was to take effect thereby can never arise, because there wants the solemnity required by law for that purpose.'

[1 Br. 155 a, pl. 83, 253; a, pl. 18; Perk. sect. 831; Lit. sect. 721; Co. Lit. 378; Co. 86, 88; Plow. 25, 29, 33 a, 35; 10 Co. 86 b, Dr. and Student, lib. 2, c. 20, 23, fol. 192, 206; Roll. Abr. 474.]

"But, because the reasoning holds only where livery of seisin is requisite, and yet the law seems to be the same in other cases where no livery is requisite, as upon a lease for years, grant of an advowson, common, rent *in esse*, &c., therefore it will be necessary to consider the following distinctions, for the better explanation and understanding hereof:

"1st. The first distinction to be observed, is between a condition and a limitation: and in case of the condition, when it precedes the vesting of the remainder as the cause thereof, and is annexed to the first estate; and where it is annexed to the first estate absolutely without any regard to the remainder.

"2d. Between a deed and a will, wherein both the same words of condition are made use of for the vesting of the remainder.

"3d. Between a limitation over in such case of a will, and where no limitation is made over.

"4th. Between remainders that are to arise upon conditions agreeable to the rules of law, and such as are to arise upon conditions repugnant and against the rules of the law.

"5th. Between such words as actually make a condition, and such as are only descriptive of the time and manner when and how the remainders are to arise and take place."

'1. *Of the Difference between a Condition and a Limitation, and in case of the Condition when it precedes the vesting of the Remainder as the Cause thereof, and is annexed to the first Estate; and when it is annexed absolutely without any Regard to the Remainder.*'

"As to the first distinction between a condition and a limitation," 'a condition is properly such, as goes in abridgment and restraint of the estate first given, upon something to be done or not done by the person who takes the estate, or by him who makes the estate, or to happen during the continuance of the estate. (a) A limitation is such as limits and circumscribes the estate to continue so long only, and no longer, than till such a thing happens, or till such a thing done or not done by the person who takes the estate, or any other; so that upon the happening, performance, or non-performance thereof, the estate *ipso facto* determines and expires as certainly as if it had been made for life or years; and upon such an estate a remainder may be limited, as well as after an estate for life or years,' "as has appeared already in part, and will so more fully hereafter.

Co. Lit. 201, 214; 10 Co. 42; Plow. 27. ' (a) Moor, 292; Co. Lit. 214; Poph. 99; Plow. 413; Cro. Eliz. 414; 10 Co. 41.'

"But in case of the condition when a remainder limited thereafter shall be good, and when not, depends upon the difference first mentioned: in the one instance, the remainder can never take effect by reason of the

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condition; but in the other, the remainder takes effect presently, and thereby destroys the condition."

'Therefore, if a man makes a lease for life or years of lands, or grants an advowson, common, rent *in esse*, &c., to one for life or years, upon condition, that if the lessee or grantee do not pay such a sum of money that then his estate shall cease, and that it shall remain to B for life, years, or in fee: this remainder is void, for these reasons. First, Because it does not vest as a remainder presently, but is to arise upon breach of the condition only. Secondly, Upon breach of the condition it cannot vest, because none can take advantage of the breach thereof, but only the party from whom the condition moves, and his heirs. Thirdly, When they have taken advantage thereof by entry or claim, the particular estate is thereby determined, and the lessor or grantor in of his first estate, as it were *ab initio*, by title paramount the estate given or granted; and then if the remainder cannot vest at the instant of the determination of the particular estate, it can never after take effect, and by consequence is defeated and gone.

Perk. sect. 830; Co. Lit. 214.'

"This case, though I do not find it *in terminis* in the books, seems to be well warranted by the case following," 'where A seised of lands in fee, let them to B for life, remainder to C for life, provided that if A hath issue a son during his life, who should live to the age of five years, that then the estate limited to C should cease, and that it should remain to such son in tail: A hath issue a son, who lived to the said age, and if the remainder limited to C should cease, and the remainder to the son be good, was the question. And *per totam curiam* it was *adjudged*, that the remainder to the son was void: wherein it appears, *first*, That this was properly a condition, because upon the happening thereof it was to shorten and abridge the estate before given. *Secondly*, This case proves the law to be the same in case of things which lie in grant, as of those which lie in livery; for here it was not the particular estate that was to cease upon the condition, but the remainder, and that lies in grant. *Thirdly*, Though the condition here was not annexed to the first estate, yet it was annexed to the estate immediately preceding the remainder to the son; and so to this purpose is the same as if it had been for life, upon such condition to cease and remain over. *Fourthly*, It appears that the remainder was not to begin but upon the condition performed, and so the condition preceded the vesting of the remainder. *Fifthly*, This case proves, that none shall take advantage of a condition but the lessor and his heirs, and therefore the remainder to the son who was a stranger could not arise thereby. *Sixthly*, That this remainder being limited to begin upon a condition precedent, whereof none can take advantage but the lessor and his heirs, is for ever defeated and destroyed, because it cannot take effect according to the terms limited for vesting thereof.'

"Cro. Eliz. 360, *Cogan v. Cogan*." ||These observations on *Cogan v. Cogan* are inserted in Fearn's Essay, 264, (7th ed.)||

'But now, if one makes a lease for life or years, upon condition to pay so much at a day certain, or reserving rent, and for default of payment a re-entry, remainder after the death of the lessee, or after the years, to B for life or in fee; or, if one makes a lease to A for life, remainder to B in fee, rendering rent, with clause of re-entry for default of payment by the tenant

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for life, and to retain during his life; in these cases the remainder vests presently in B, and has no dependence on the condition for its taking effect. But, if the condition should be broken, or the rent arrear, B cannot enter, being a stranger; and if the lessor should enter, he would be in of his first estate by title paramount the remainder, and then the particular estate being determined before the remainder could take effect, the remainder would thereby be destroyed. But this would be unreasonable that he should destroy the remainder, which was well vested by his own grant; and since every man's grant shall be construed strongest against himself, and this must be to support and make good the estate he has parted with; therefore by such remainder over the condition is destroyed, and the power of re-entry gone, and then the first estate is absolute, with the remainder over: and the lessor has no remedy for the money or the rent, but in a court of equity.

Perk. sect. 831; Co. Lit. 214, 338; Co. 40; Roll. Abr. 472; Cro. Eliz. 727, 92; Dyer, 127; Doct. & Stud. 1. 2, c. 21; Fearne's C. R. 270, (7th ed.)

2. *Distinction between a Deed and a Will, when in both the same Words of Condition are made use of for vesting the Remainder.*

'Here we must observe, that though in case of a deed, either the condition destroys the remainder, or the remainder the condition, as appears before, yet in a will it is otherwise.

'Thus, one seised of lands in fee, devisable by custom, by will devised them to J S a clerk, upon condition that he should be a chaplain, and sing for the soul of the devisor all his life; and that after his death the land should remain to J D mayor of S and his successors, to find a chaplain perpetually to sing for the soul of the devisor, and dies. J S being of the age of twenty-four years, enters, and holds the land for six years, and is not a chaplain; the heir of the devisor ousts him; then J S brings an assize, and upon the pleading thereto by the heir, and all this matter found, the assize went for the plaintiff; whence my Lord Coke infers, *that this was no limitation*, because then the estate of J S would have been *ipso facto* determined, and the estate cast upon J D, and then J S could not have recovered; *secondly*, That this being a condition J D in remainder could not enter for breach thereof; and, *thirdly*, Since it was adjudged likewise against the heir that he could not enter for the condition broken, therefore the condition by the limitation of the remainder over must be destroyed. But Perkins in citing this case holds, that for breach of the condition the heir might enter, and yet that the remainder should not be defeated thereby, but that after the death of J S it should well take effect; and with him agrees Dyer in a like case, and takes the diversity between a *remainder by deed with livery*, and a *remainder by will*; for in case of the *deed*, the entry for the condition broken *defeats the livery*, and, by consequence, *the remainder* which depends thereon; but in case of a *will* the *remainder is good*, though the particular estate never was good, or be defeated before the remainder can take effect, which must be as an *executory devise*, not as a *remainder*; for then it ought to vest when the particular estate ends; and without question, as an *executory devise*, such limitation over *is good*; and therefore, where Plowden in citing this case holds it to be a *limitation*, and not a *condition*, because then by the entry of the heir the remainder over would be defeated, this reason holds not,

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when by construing it *an executory devise* it may be made good, and yet the condition be preserved.

29 Ass. pl. 17; Perk. sect. 563; Plow. 412; Dyer, 127; 10 Co. 40; Roll. Abr. 407, 474. *Where the prompt performance of a condition is necessary to give the feoffor the whole benefit contemplated, the feoffee shall not have his lifetime for performance, but only a reasonable time.* Hamilton v. Elliott, 5 Serg. & R. 384.*g*

‘So where A, seised of lands in fee, having issue three sons, B, C, and D, devises the lands to his wife for life, *sub conditione quod ipsa educabit pueros testatoris in eruditione et bonis moribus*, the remainder to D his son in tail, and dies; the wife enters and breaks the condition: and if B, as heir, should enter for the condition broken, or if D should enter as by limitation, or if the condition was destroyed by the limitation over, were the questions; *et per totam curiam*, as my Lord Coke cites it, it was held to be no limitation, because there are express words of condition; and if it be a condition, then the heir, by his entry for breach thereof, would defeat the remainder likewise, which is not reasonable; therefore it was held, that by the limitation over the condition was destroyed. But in Dyer, which seems to be the same case, it was held *the condition was not destroyed*, but that, for breach thereof, the heir should enter, and hold during the life of the wife, and yet that after her death D should have the land, which must be by way of *executory devise*.

10 Co. 41; Dyer, 127; Roll. Abr. 472.

‘But, however the law might have stood when devises of lands were not very frequent, it is now settled that, in case of a will, the *devisee in remainder shall enter for breach of the condition annexed to the first estate*, be it devised to a stranger, or to the heir himself. This construction was introduced to support the intent of the testator, which otherwise, in many cases, would be totally frustrated, and his will set aside: and, to make way for such construction, they held, that by non-payment of the sum, or non-performance of the thing directed to be done, *the estate of the first devisee determined immediately without entry or claim*, and then *the remainder succeeded as if there had been no condition at all*; and so they changed the condition into a limitation, which determines the estate to the first, and casts the possession on the second by way of *immediate remainder*. Another reason of this construction might be, that seeing, by the limitation over, the land was given from the heir at law, and a new heir made, it was now more reasonable that this *hæres factus* should take advantage of the condition, who was to have the benefit of the land, then the *hæres natus*, who, by such limitation over, was excluded and shut out from inheriting the land; and since none can enter for breach of the condition but the heir, and now by giving him the land, the devisee is become heir thereof, therefore they construed such *hæres factus* to be the *heir who should enter for breach of the condition*. And this was still more reasonable, when the first devisee was himself heir at law, and was to perform the condition; for otherwise, whether he performed it or not, the remainder could never take place, since none could take advantage of the breach thereof but he himself who was to perform it; and by consequence, the remainder, which was to arise upon the breach of such condition, would be prevented and destroyed, and the intent of the testator eluded.*(a)*

Vide title *Conditions*, letter (II); 2 Mod. 26. *(a)* In other words, it is now agreed, that wherever in a devise a condition is annexed to a preceding estate, that condition shall operate as a limitation, circumscribing the continuance and measure of the first

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estate; and that upon the breach or performance of it (as the case may be) the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation over shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have immediate right to the estate. Thus, indeed, is the testator's intention effectuated, by substantiating the remainder, though limited to a stranger; and enforcing the performance of the condition by the determination of the particular estate upon the breach of it, notwithstanding that particular estate be limited to the heir himself; and limitations of this sort are properly called conditional limitations. Fearn, 272, (7th edit.); Plowd. 408; Scholastica's case, *et infra*, 394.

‘Therefore, where a copyholder in fee of lands, descendible in Borough English, having three sons and a daughter, surrendered his land to the use of his will; and after by will devised his lands to his eldest son in fee, (for so it was construed,) paying to each of his brothers and his sister 40*l.* within two years after his death, and died; the eldest son was admitted, and did not pay the money within the two years; the youngest son entered; it was adjudged, that his entry was lawful; for though in a will the word *paying* amounts to a condition, yet, if it should be construed a condition, in this case it would descend on the eldest son himself, who was to perform it, and also take advantage of the breach thereof; and then whether he performed it or not would be all one, since either way he was to have the land; and so the youngest children would be not only without remedy for their portions, but there would likewise be no penalty upon the eldest to enforce the payment thereof, which would frustrate the intent of the testator; therefore they construed the devise to the eldest son paying, &c., to be a limitation to him till he made default of payment only, and no longer; and then by such default, his estate ceasing, the nature of the land revives and lets in the youngest son, who was heir by the custom, since there was no limitation over.

Welcock v. Hammond, 3 Co. 20; Cro. Eliz. 204; 2 Leon. 114, cited Cro. Ja. 592; Roll. R. 219, and in several modern books.

‘So, where one, seised of lands in fee, having issue two sons and a daughter, devised to his youngest son and daughter 20*l.* a piece, to be paid by his eldest son; and devised his lands to his eldest son and his heirs, upon condition, that if he did not pay the said sums, that then the land should remain to his youngest son and daughter, and their heirs, and died; the eldest son entered, and did not pay the money; it was adjudged that the youngest son and daughter should have the land; for *first*, this devise to the eldest son and heir, being no more than what the law gave him, without such devise, was void. *Secondly*, if this should be a condition, it would be defeated by the descent on the eldest son, who was to perform it. Therefore, *thirdly*, it was held to be a devise to the eldest son only, or no longer than till he failed to pay the said sums; and then to the youngest son and daughter, which gives them the land by way of *limitation*, upon his failing to pay the said sums. But Vaughan, in citing this case, holds, the devise to the eldest son being void, that then it was no more than if he had devised, that if his eldest son did not pay such sums, that then the land should be to the legatees; which makes a *good future executory devise*, and the land in the mean time descends to the heir at law, as if no devise had been made thereof. This construction is well warranted by the case, and answers the purpose for which it was cited by Vaughan; but the other construction, in making it an *actual limitation*, is more natural and agreeable to the words and intent of the will.

Hainsworth v. Pretty, Cro. Eliz. 319, 833; Moor, pl. 891; Roll. Abr. 411; Vaugh. 271; 2 Mod. 26.

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‘One devises lands to A his wife, upon condition that she do not marry; and if she marry or die, that then the land shall remain to B in tail; and if B die without issue in the life of A, that then the land shall remain to A to dispose thereof at her pleasure; and if B survive A, and after die without issue, that then the land shall be divided betwixt the sisters of the devisor, and dies: B dies without issue, in the life of A; it was adjudged, that A had a fee by the words *to dispose thereof at her pleasure*; and that the remainder to the sisters was upon a contingent, which never happened, viz., B’s surviving A, but B dying before A the devise of the fee to A was absolute. And though it was doubted if a remainder might be limited to begin upon a condition precedent, annexed to the first estate, as in this case it was, yet, being in a will, it was held to be a new executory devise of the reversion, if the estate had been defeated by the precedent condition, and not as a remainder; or at least the condition should be construed to amount to a limitation till she married; and so the remainder would be made good thereby upon such determinable particular estate.

Leon. 283, Jennor v. Hardie.

‘One devises lands, devisable to A for life, upon condition that if his heir, to whom the reversion descends, disturb A or the executors of the devisor of their administration, that then the land shall remain to the daughter of the devisor and her heirs, and dies; A dies; the daughter brings a formedon in remainder against the son and heir of the devisor, and alleges, that he disturbed A and the executors also; and issue was joined upon it; which proves that the limitation to the daughter was good as an executory devise, to take effect upon such disturbance; and the fee, in the mean time, descended to the heir; and the book adds, that this could not be a condition, because then, by the descent to the eldest son, who was to perform it, it would be destroyed.

Plow. 27, 414.’

‘This is true; but this in strictness was no manner of condition, but only a designation of the time when, and the manner how, the future executory devise to the daughters was to take effect, as will appear hereafter.

‘*Cestui que use* in fee before 27 H. 8, devises his lands to his wife for life, *ita quod non faceret aut permetteret aliquod vastum*, the remainder after her death to his second son in tail, and dies; and after the statute, the wife commits waste. A *quere* is made, Whether the feoffees, or heir of the devisor, or he in remainder should enter for the condition broken? And if, by entry of the heir or feoffees, the remainder be destroyed? No resolution is given in it; but, by the laws before mentioned, it seems clear, that if the heir does enter for the condition broken, and hold during the life of the wife, yet after her death the remainder to the second son will be good, by way of executory devise; for the remainder, not being to take effect by express words till after her death, he in remainder cannot enter upon breach of the condition by making it a limitation, till she does waste, and to vest presently upon such waste committed.

Dyer, 117 b, Hubby’s case.”

‘A having issue three sons and two daughters, and the eldest daughter having issue B, and the youngest issue C; A by his will devises lands to his wife for life; and after her death to his grandchild B, and the heirs of her body; provided always, and upon condition that she marry with the

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consent of D, E, and F, or the major part of them; and in case she marries without such consent, or dies without issue, then he bequeathed the said premises to C, and died; B married G without consent of any of the persons named for that purpose, and thereupon C entered upon her. It was held clearly to be a limitation to her till she married without such consent, and not a condition: for then it would descend to the heir at law, and he, for breach thereof, might enter and defeat the limitation over; therefore it was construed to be a limitation, and that the marriage without such consent determined her estate-tail, and cast the possession upon C by way of immediate remainder.' "And it was said, that this had received as many resolutions as ever any point did, and nothing but the opinion Co. 10, 40, against it, which was held not to be law; and that Coke himself was of another opinion in Welcock's and Hammond's case, where the doubt in Dyer, 316, fo. 5, which was upon express condition, was well resolved by construing it to be a limitation. Also, admitting it to be a condition, yet C, who was the *hæres factus* by the limitation of the remainder to her, ought to enter for breach thereof."

'Fry v. Porter, or Williams v. Fry, Vent. 199; 2 Lev. 21; Mod. 86, 300; 3 Keb. 756, 787; "2 Roll. R. 225; 1 Vent. 203; 2 Mod. 26."

'One devises lands to A his heir at law, and devises other lands to B in fee, and if A molest B, by suit or otherwise, he shall lose what is devised to him, and it shall go to B, and dies: A enters into the lands devised to B, and claims them. It was held, first that this was a sufficient breach to give title to B. Secondly, That if this should be a condition, it would, by the descent thereof to A who was to perform it, and also to enter for the breach thereof, be merged and defeated; therefore it was held to be a *limitation* which determined the estate of A, and cast the possession upon B without entry.

2 Mod. 7, Shuttleworth v. Barber; '||Ferne, 273, (7th ed.) and vide 4 Burr. 1929. ||

"And this construction hath been made, not only in cases of last wills and testaments, but hath likewise obtained in conveyances to uses, as appears by several cases before mentioned."

'So, where one levied a fine to the use of A and B his wife for their lives, and the life of the longer liver of them; remainder after their deaths for six months to the use of the executors of A, and after the six months ended, then to the use of C and D his wife, and the heirs of their two bodies; and for default of such issue, to the use of A, and his heirs; provided that if it happen the said A, at any time after, have issue of his body, or any wife of the said A at the time of his decease to be *enceinte* with any issue begotten by the said A, that then, after such issue had, and after 500 marks paid or tendered to C and refused, within six months next after the birth of such issue, that then the use of the said lands, immediately after the decease of the said A and B, and the said six months, shall be to the said A, and the heirs of his body; and for default of such issue, to the right heirs of A; then B dies, and A takes another wife; and by Plowden and Dyer, till issue and the six months past, A hath not any larger estate than he had before. But *quære*, if by the first limitation A hath not the fee till issue; and then upon payment, or tender and refusal of the 500 marks, and the six months past, the use limited to C and D in tail, with remainders to A in fee, does not cease and settle in A in tail with remainder to him in fee as by limitation? For where A and B joined in a fine to the use of A in fee, if B did not pay to A

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10*l.* before such a day, and if he did, then to the use of A for life, remainder to B in fee; in this case it was held, that if B did not pay the 10*l.* before the day, A should have the fee absolutely; which proves that he had it before *sub modo*, or subject to be determined upon such payment, and a use may well be limited to cease in one, and to go over to another; and the statute of 27 H. 8, c. 10, carries the possession after it; and, in the first case, the use being expressly limited to A in fee, must, as it seems, vest in him till the contingency happens, which determines that use, and gives him another instead of it, to which the statute carries the possession accordingly. But *quare*.

Dyer, 314, pl. 96; Roll. Abr. 415, pl. 12, 469; Vent. 201; Spring v. Cesar, Jon. 390; * * Vide Dyer, 314, pl. 96; Moor, 99, pl. 243; and Ley, 54; * * ||Fearn, 275, (7th edit.)||

|| Where there was a surrender of copyholds, to the use of the surrenderor for life, and afterwards to the use of his youngest son, and the heirs of his body, if he attained the age of 18, and if he died before 18 without issue male, then to the right heirs of A; it was held to be a condition subsequent with respect to the youngest son; and therefore the remainder vested immediately, subject to be defeated by the condition of his dying without issue male before he attained the age of 18. Here it was evidently the intent, that the estate should not go to the heirs of A if the younger son died before 18 leaving issue male; but if the estate was not to vest till he attained 18, this intent could not have been satisfied.

Stocker v. Edwards, 2 Show. 398; Vide Edwards v. Hammond, 3 Lev. 132, where the same case seems to be somewhat differently reported.

In case of a devise to the testator's wife, till his son should attain to his age of 21 years, and when his son should attain to that age, then to his son and his heirs; the son died at the age of 13 years; and it was held, that the wife's estate determined on his decease; and that the remainder vested in the son upon the testator's death, and did not expect the contingency of his attaining 21 years of age.

Manfield v. Dugard, 1 Eq. Abr. 195; and vide 2 Atk. 304; Trodd v. Downes, and Boraston's case, 3 Co. 20.

And where the testator devised lands to two trustees, and the survivor of them and his heirs, in trust to lay out the rents and profits for the maintenance of two nephews of the testator during their minorities; and when and as they should attain their respective ages of 21 years, to be and remain to those two nephews and their heirs equally; it was resolved, that the nephews took the fee immediately; and upon a devise to A to the use of B till B attained the age of 21, and then to B in fee, it was held the fee vested immediately in B.

Goodtitle dem. Hayward v. Whitby, 1 Bur. 228; Denn d. Satterthwaite v. Satterthwaite, 1 Black. R. 519.

So, in a still later case of a devise to trustees and their heirs, until the testator's great nephew, then an infant of about 13 years of age, should attain the age of 24 years, on condition out of the rents, &c., during that time to keep the buildings in repair; and he devised unto his said great nephew, and to his heirs and assigns for ever, when and so soon as he should attain the age of twenty-four years, the premises in question; and directed the trustees to surrender the premises (being copyhold) accordingly; it was held that the fee vested in him immediately, and upon his death intestate under 24 years of age, descended to his heirs at

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law; and here the distinction was noticed between the words *when* and *then*, &c., only denoting to the time of vesting in possession, and the conditional word *if*.

Doe. dem. Wheedon v. Lea, 3 Term R. 41; and vide Nanfan v. Legh, 7 Taunt. 85; Goodright dem. Hoskins v. Hoskins, 9 East, 306; Foster v. Ld. Romney, 11 East, 594. Vide Brownsword v. Edwards, 2 Ves. sen. 243.

Here I might also notice, as in some degree connected with the cases I have been treating of, certain instances of conditions precedent, not founded on any contingency of the effect or determination of any antecedent estate created by the same instrument. But for the cases of this nature, not falling under the designation contingent remainders, I shall refer to the last part of this treatise. Some instances are also to be met with, where the contingency, upon which an estate is limited, has been considered as a condition subsequent instead of precedent, so that the estate becomes vested immediately, subject to be defeated by the condition when it happens, in the room of not taking effect till such condition happens: the case of Stocker v. Edwards above stated may be considered as an instance of this sort; but the cases of this class appear rather to belong to the descriptions of shifting uses or trusts, or executory devises.

Vide Moorhouse v. Wainhouse, 1 Black. R. 638, (D); Doe dem. Vesey v. Wilkinson, 2 Term R. 209; Roundel v. Curren, 2 Brown's Chan. Cas. 67; Fearne, 508, n. Vide Springle v. Cesar, 1 Roll. Abr. 415, pl. 12; β Lippit v. Hopkins, 1 Gallis. 454.

The doctrine of Stocker v. Edwards, as far as it relates to the point under consideration, was fully recognised and established in the case of Bromfield v. Crowder. There the testator devised all his real estate to E D and J R for their lives respectively, and after the decease of the longest liver of them to John Davenport Bromfield, if he lived to attain the age of 21 years, but not otherwise; and in case he died before he attained that age, then in the manner therein mentioned. Both E D and J R died while Mr. Bromfield was under the age of 21 years.

The cause coming on at the Rolls, his honour ordered a case to be made for the opinion of the judges of the Common Pleas, upon the question whether Mr. Bromfield in the events which had happened took any, and what, estate or interest in the freehold or copyhold estates of the testator? The judges were of opinion that Mr. Bromfield took, both in the freehold and copyhold lands, a vested estate in fee-simple, determinable on the event of his dying under twenty-one.

1 New R. 313; and vide Doe v. Nowell, 1 Maule & S. 327; Fearne, C. R. 247.

So also, where there was a devise of freehold estates to J R, nephew and heir at law of testatrix for life, and on his decease, to and amongst his children lawfully begotten equally, at the age of twenty-one, and their heirs, as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one years: and in case his said nephew should die without lawful issue, or such lawful issue should die before twenty-one, then over: it was held by the Court of K. B., and by the House of Lords, that the children of J R took a vested remainder.

Randall v. Doe, 5 Dow. P. R. 202.

And so, where there was a devise to J M in fee when he attains twenty-one, but in case he dies before twenty-one, then to his brother when he attains twenty-one, with like remainders over; it was held that

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J M the devisee took an immediate vested interest, liable to be divested upon his dying under twenty-one.

Doe v. Moore, 14 East, 601. || β See Jackson v. Chew, 12 Wheat. 153; Waring v. Jackson, 1 Peters, 570; Barnitz v. Casey, 7 Cranch, 456; Lippit v. Hopkins, 1 Gallis, 454; Kerlin v. Bull, 1 Dallas, 175; Hauer v. Sheetz, 2 Binney, 532; Robinson v. Adams, 4 Dallas, Appx. xii.; Holmes v. Holmes, 5 Binney, 252.*g*

'One levies a fine, the conusee grants and renders the lands to the conusor in tail, upon condition that he and the heirs of his body should bear the standard of the conusee when he went to battle, and if they failed, that it should remain to a stranger in fee: this was held a good remainder, to begin upon such condition; but *quære* of this case, unless it be intended by way of limitation of use, which may cease in one, and be limited to another.

Plow. 34.'

'A by lease and release settles lands to the use of himself for life, remainder to B for life, remainder to the first, second, and other sons of B in tail, remainder to C for life, remainder to his first, second, and other sons in tail; provided that if B married without the consent of A during his life, and after his death, of D, E, and F, then the uses limited to B and his sons to cease, and then to the use of C. B marries without such consent, and C enters, and upon a bill brought in Chancery by B to be relieved for want of notice of the settlement, they were dismissed to law. Which argues that the use to B and his sons was determined by limitation, and the use in remainder to C, which carried the possession after it, was well vested, and therefore they were sent to law.

2 Chan. Cas. 109, Booth v. Booth."

'Upon a writ of error out of Ireland the case was this: A seised of lands in fee, and having issue only one daughter, named B, by lease and release conveys his lands to the use of himself for life, and after his death to the use of B in tail, provided that she married with the consent of the trustees, or the major part of them, some person of the family and name of Fitzgerald, or who should take upon him that name immediately after the marriage; but if not then the trustees to raise a portion out of the said lands for B, and the lands to remain to C; A dies, and B marries one who neither was nor took upon him the name of Fitzgerald; and the only point on which judgment was there given, was the want of notice in B of the settlement, without which, being heir at law, and so having a title by descent, she was not bound *ex officio* to take notice of the condition. But this fully proves the point in question, that if she had had sufficient notice of the condition, her breaking it had determined her estate, and cast the possession upon C, who was next in remainder.

3 Mod. 28, Malone v. Fitzgerald.'

β A devise to B on condition of marrying a certain person is a condition subsequent, and (uncontrolled by other words) takes effect immediately, and the devisee has her whole life to perform the condition.

Finlay v. King's Lessee, 3 Peters, 376.*g*

'3. *Distinction between a Limitation over in case of a Will, and where no Limitation is made over.'*

"The third distinction I observed, was between a limitation over in case of a conditional devise in a will, and where no limitation was made over

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upon breach of the condition; and both parts of this distinction sufficiently appear from the laws already mentioned under the first and second head; I shall therefore only add the two following cases for further illustration thereof. The first whereof was this:—

‘A seised of lands, and having issue two daughters only, devised lands to the eldest and her heirs, and that she pay to her youngest sister yearly 30*l*. And *per cur.*—This was a condition, for otherwise the youngest sister would have no remedy for the rent; and being a condition, it descended upon both the daughters as heirs, and for breach thereof the youngest might enter into a moiety of the land with her sister; for there being no limitation over to the youngest for default of payment, if she had not been equally heir with her sister, she would have been without remedy.

Cro. Eliz. 146; Crickmere v. Paterson, Swinb. 115.

‘So, where a copyhold in fee of lands in Borough English, having issue three sons, A, B, and C, surrendered his land to the use of his will, and after devised them to B in fee, upon condition that he should pay to his four sisters 20*l*. a-piece at their full age, and died; A the eldest son had issue two daughters, and died; B was admitted, and did not pay the 20*l*. a-piece; C the youngest son entered: it was objected, that this was a limitation to B till he failed to pay, &c., and so should go to the youngest son, who was inheritable by the custom. But it was adjudged to be a condition, and that for breach thereof the daughters of A, the eldest son, should enter; but it seems that after such entry the heir by custom shall enter upon them. But *quære*, if the devise had been to the eldest son upon such condition, this had been a limitation, which, upon non-payment, would have carried the land to the youngest son, who was heir by custom: for otherwise, if it should be a condition, by the descent to the eldest son, it would be merged and defeated. But *quære*, if the land had been descendible to the eldest son as other inheritances at common law are, and such conditional devise had been made thereof to the eldest son without any limitation over for default of payment, *quære* if in such case the legatees had any other remedy than by bill in equity for their legacies; for the land not being given to them, it will be hard to maintain that for breach of the condition the land should go over to them; therefore in such case it should seem they have no remedy but in Chancery, where the eldest son will be looked upon as a trustee for the payment of so much money to them.

Cro. Ja. 56; Curtis v. Wolverston, Poph. 11.¹

β A testator devised one-third of his estate, consisting mostly of personal property, to his wife, for her use and benefit, so long as she should remain his widow, and then devised the whole of his estate to his children; held, that this was sufficient to create a remainder over.

Griggs v. Dodge, 2 Day, 28.

Where the performance of a condition (subsequent) becomes impossible or impracticable, the condition is void.

People of Vermont v. Society for Propagating the Gospel, 1 Paine, 652; United States v. Arredondo, 6 Peters, 691; Hughes v. Edwards, 9 Wheat. 489; Taylor v. Mason, 9 Wheat. 345. See Gauze v. Wiley, 4 S. & R. 509.

A testator devised the remainder of his estate to be kept together until his son W C arrived at the age of twenty-one years, and that then an equal division of all his personal property should be made between his sons W C and D C, “and if either of my sons, W C or D C, dies without law-

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ful heir, my desire is that the surviving brother shall inherit all the estate of the deceased." Held, that this was a good limitation over.

Cordle v. Cordle, 6 Munf. 455.

Testator devised as follows: "I give unto my beloved nephew A B, the following negroes, (naming them,) them and their increase to him and his heirs for ever, but in case it should please God for him to die without heir, then and in that case, it is my will what I have given him to be equally divided between my two nieces, M A and P A." Held, that this was a good limitation over to the nieces.

Timberlake v. Graves, 6 Munf. 174.

Testator bequeathed the "balance of his estate to his brother A B, in case he dies without issue, to be equally divided between my uncle's children, to wit," naming them, but without words of perpetuity; held, that the limitation over was good.

Gresham v. Gresham, 6 Munf. 187.

Devise of slaves for life, and should the devisee die without issue, remainder over, the limitation over not too remote.

Didlake v. Hooper, Gilmer, 194. See the following cases where the limitations over were considered as too remote. *Davidson v. Davidson*, 1 Hawk. 180; *Bryson v. Davidson*, 1 Murph. 143; *Davidge v. Chaney*, 4 Har. & M'H. 393; *Matthews v. Daniel*, 2 Hayw. 346.g

*4. *Distinction between Remainders that are to arise upon Conditions agreeable to the Rules of Law, and such as are to arise upon Conditions repugnant and against the Rules of Law.*

"As to the first part hereof, how far remainders upon such conditions, and so far as they may be called conditions, which do not go in restraint and abridgment of the first estate, are good, will appear under the 5th and last distinction. But as to the remainders that are to arise upon conditions repugnant, and against the rules of law, this has been already cleared in part under the first distinction, and will now fully appear by the cases following:"

"Therefore, if one by his will, by covenant to stand seised, feoffment to uses, or other conveyance whatsoever, gives or conveys lands to, or to the use of A his eldest son, and the heirs male of his body, remainder to, or to the use of B his second son, and the heirs male of his body, and so to the third and other sons in like manner; and after adds a proviso, that if A or his issue, or any other of his sons in remainder, shall attempt to alien, &c., or shall alien, &c., by which any estate shall be barred, &c., that then immediately after such attempt, and before any act executed, or immediately after such alienation, the use and estate of him so attempting, or aliening, &c., shall cease as if he were naturally dead, and that then it shall remain immediately to such persons to whom it ought to come by the intent of the indenture or will, or to him in the next remainder, &c. In this case the remainders are actually vested as remainders in all the sons; but as to their taking effect in possession upon breach of the condition, or sooner, or otherwise than they would have done if there had been no condition at all, the proviso or condition is totally repugnant and against law; for be it either a condition or a limitation, it cannot carry over the estate to him in remainder upon breach thereof. For if it be a condition, then the donor and his heirs only can take advantage of the breach thereof, not those in remainder who are strangers; and if the donor or his heirs enter for breach of the

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condition, they thereby defeat not only the present estate, but all the remainders dependent thereupon. If it be a limitation till they alien only, yet it is repugnant, that when by the alienation the estate is actually settled and vested in the alienee, the same alienation should at the same time vest and settle the estate in another; and for the words *attempting, endeavouring, or going about to alien*, they are of too uncertain a signification to receive any countenance, and what shall be said a sufficient attempt, and what not, is hard to determine; besides that all such clauses tend to perpetuities, to fix estates in families unalienable, that they can upon no exigencies or emergencies whatsoever dispose thereof, to provide for payment of their debts, their wives, or younger children; and also they destroy and enervate the force of fines and common recoveries, the great and common assurances whereby men hold their estates, and therefore with just reason all such clauses are exploded and disallowed.

1 Co. 83; Mo. pl. 831, 869; 6 Co. 40; 9 Co. 127; Cro. Eliz. 378; Cro. Ja. 698; 10 Co. 36; Mo. pl. 496; Swinb. 112.' β A general and perpetual restriction against alienation after a conveyance in fee is void; but a partial restriction as to a particular person, or during a particular time, is good. *M'Williams v. Nisby*, 2 Serg. & R. 513.

'One devises lands to his son A and the heirs male of his body; provided that if A, or any issue male of his body, alien, give, or grant the premises to any person for above twenty years, &c., that then the said premises, *for default of such issue male* of the body of A, immediately upon every such alienation, gift, or grant, shall remain and come to his (the testator's) son B, and the heirs male of his body, &c., and dies; A enters and makes a lease for a thousand years, and dies without issue male, leaving C his daughter and heir; B enters upon her, C re-enters. It was held, *first*, That the remainder to B was not to take effect but upon alienation and death without issue male, and not upon the death of A without issue male only. *Secondly*, That the remainder being limited to take effect upon such alienation should never arise, because by the alienation the land is given to another, and then it is repugnant to make the alienation to one sufficient to carry the land to another.' "Note: This case appears in *Croke* to be adjudged in C. B. and B. R. for the daughter of A, but in *Moore* it is said, that in error afterwards brought in B. R. the judgment was reversed, but no reasons for the reversal are there mentioned. This case agrees with the case of *Acton v. Hare* above-mentioned, where it was holden, that without an attempt to alien, the remainder was not to arise; and upon that point only judgment was there given, without entering into the nature or validity of the limitation, which by the foregoing cases appears to be clearly against the law."

Cro. Ja. 61; 10 Co. 86; Moor, 772, *Loveit v. Goddard*.' ||Vide *Mainwaring v. Baxter*, 5 Ves. 458; *Doe dem. Gill v. Pearson*, 6 East, 173, 180; *Fearne*, 256, n., f. iv. (7th ed.)||

'One devises land to A in tail, upon condition that he shall not alien, and that *if he dies without issue* it shall remain to B in fee; after A aliens, yet B cannot enter for the condition broken, but the heir at common law, because this is not a limitation, but a condition, by *Coke* and *Warburton*. But *quære*, if A after dies without issue, if B may not enter; for though the heir enter for the condition broken, and hold till the estate-tail determined, yet the remainder to B seems good by way of executory devise, to arise out of the reversion vested in the heir by his entry for breach of the condition, and not as an immediate remainder, because it is not to take

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effect till the death of A without issue, and yet the estate-tail of A by breach of the condition may determine long before.

Roll. Abr. 412, *Skirn v. Lady Bond*.

‘One devises lands to A and the heirs male of his body, provided, if he does attempt to alien, that then immediately his estate shall cease, and B shall enter: after A makes a feoffment in fee, and thereupon B enters; and it was adjudged in the grand sessions against B, whereupon he brought a writ of error. And *first*, it was agreed, That tenant in tail could not be restrained from alienation by fine or recovery. *Secondly*, That a bare attempt would be no breach; but then it was argued, that he might be restrained from aliening by feoffment, or other act which would amount to a tort, and make a discontinuance, and that this proviso imports as much; and therefore the feoffment was a breach, for that was an attempt, and more; and that therefore it should determine the estate-tail *quasi* by limitation, which would give an immediate title of entry to B by executory devise, and that the current of authorities since 10 Co. 40, are, that a condition in a will shall be taken as a limitation. But the whole court held the condition void, because *non constat* what shall be adjudged an attempt, and how it should be tried; and so the judgment was affirmed.

Vent. 321; 3 Keb. 787, *Piers v. Wynn*; and vide Plow. 408; Moor, 543.

‘But where one, having two sons, devised Blackacre to his eldest in tail, and Whiteacre to his youngest son in tail, *provisio semper* that if any of his children alien or demise any of his lands to them devised before they come to the age of thirty years, then the next brother shall enter; the eldest enters, and lets Blackacre before his age of thirty years: this was held a good limitation till they aliened, and that upon alienation it should go to the other. But this case differs from the preceding cases, for here was no total restraint of alienation, but only till they arrived to such an age as they might be presumed to have full discretion, and to know well what they did, which was but a reasonable restraint; but in that case where the younger brother entered into Blackacre by virtue of the limitation, and aliened it before his age of thirty, it was held, that the eldest brother could not enter into it again, because by the entry of the younger brother that part was discharged of the limitation for ever.

2 Leon. 38; Mo. 271, *Spittle v. Davis*.^β See *Steedman v. Cook*, 13 Serg. & R. 172.^g

“These cases being so adjudged, though none of them do in express terms deny Scholastica’s case to be law, yet the resolution of that case can hardly stand, as it tends as directly to a perpetuity as any of them. The case was this:—A man devised lands to his eldest son in tail, remainder to his youngest son in tail, remainder over in tail, remainder to his own right heirs; and if any of the entails do wrong, vex, or molest any other of them for the said lands, or mortgage, bargain, and sell the said lands, or otherwise encumber them, &c., that then every such person, and his and their heirs, shall forthwith be excluded and discharged touching the said entail; and that the conveyance of the entail of the said lands against him or them shall be of no force, but that it shall descend and come to the party next in tail to him, as if such disorderous person had never been mentioned in the will. The eldest son enters and avoids a fine, and suffers a common recovery, and the youngest son enters upon him. It was adjudged that his entry was lawful, and that the estate of every one in re-

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mainder was subject to the limitation to cease by alienation. And that the next in remainder might enter; for that it was not a condition, because then it would descend to the eldest son himself, and by his alienation would pass extinguished in the land; but being a limitation, it is as if it were devised to every of them till they aliened, and so by alienation their estate *ipso facto* determines, and is cast upon him in the remainder before entry. And for construction of the condition by limitation in a will, this case seems to have led the way to all the cases that have followed upon it. But for the nature of the condition, all the cases before mentioned seem to condemn it. And my Lord Coke says, (a) that a contrary judgment was given in the same case afterwards by Popham and two justices; though Moor, in reporting the same case, mentions it to have been adjudged by Popham and two justices according to the resolution in the Commentaries. But the case at this day by good opinion is held to be no law, as being introductive of a perpetuity which the law condemns.

Plow. 401, *Newis v. Lark*, or *Scholastica's case*, Mo. 543, pl. 721." || On this case Mr. Fearnce observes,—“Though *Scholastica's case* (where tenant in tail under a proviso of this nature levied a fine and suffered a recovery, and it was held by the court to have determined the estate-tail by limitation, and have given a title of entry to the next in remainder, the point respecting the invalidity of restraining a recovery being not at all moved on the arguments on the case) was cited in *Mary Portington's case*, 10 Rep. 36, as an authority for the validity of the restriction, yet it was observed that the tenant in tail in *Scholastica's case* first levied a fine, which, for any thing that appeared, was a fine *at common law*; and then it was a discontinuance and wrong, and therefore might be restrained by condition.” *Fearnce*, C. R. 259, (7th edit.) || “(a) 10 Co. 42.” [Vide *Bateman v. Allen*, Cro. Eliz. 437.]

Upon a marriage settlement A is made tenant for life, remainder to the heirs of his body by his wife Jane; and in the same deed A covenants not to suffer a recovery, but that the lands shall be enjoyed according to these limitations; A notwithstanding his covenant suffers a recovery, and devises the lands. It was held in Chancery, that A being tenant in tail, and as such having power to suffer a recovery, the lands devised should not be affected, but that the covenant was good, and should therefore bind his assets.

1 P. Wms. 104; 2 Vern. 635, *Collins v. Plummer*.

|| Upon the principle of the above cases it has been held, that a trust term, created in a settlement for the purpose of enabling trustees, in the event of an agreement or attempt at alienation by a tenant in tail, to raise a sum of money equivalent to the value of the estates contracted to be aliened, and to pay it to the parties next in limitation after such estate-tail, was void; as being a device to prevent alienation, and inconsistent with the rights of the persons to whom estates-tail were limited.

Mainwaring v. Baxter, 5 Ves. 458.

But a devise to two of testator's five daughters and their heirs, as tenants in common, on condition that if they, or either of them, should have no issue, they or she should have no power to dispose of their or her share, *except to her sister or sisters*, has been held good.

Doe dem. Gill et Ux. v. Pearson, 6 East, 173.||

‘5. *Distinction between such Words as actually make a Condition, and such as are only descriptive of the Time and Manner when and how the remainders are to arise.*’

“The fifth and last distinction I shall mention is, between such words as actually make a condition, and such as are only descriptive of the time

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when, and manner how, the remainders are to arise and take place. And this is the more necessary, because in several of the foregoing and other cases great disputes have arisen, when the word condition has been in the deed or will, though in reality there has been no manner of condition at all; for a condition, as appears before, properly and strictly taken, must go in restraint and abridgment of the estate first given, otherwise it is no condition, but only a *modus* or particular qualification whereby such a person is to entitle himself to the estate in remainder, and has no manner of relation to the first estate either to shorten or abridge it."

'Therefore, where one made a lease to A for life, remainder to B for life; and if it happen B dies before A, then the lands to remain to C for life; B dies in the life of A, and then A dies, and if the remainder to C was good, was the question? It was argued that it was not, because it was appointed to begin during the particular estate, where it ought to be limited to take effect after the particular estate ended; and therefore a lease for life to A, remainder to B for life, and if A dies, that then it shall remain to C in fee, this remainder is void, because then it would subvert the remainder to B, and therefore is repugnant to the estate first limited to B. So, a lease to two for their lives, remainder after the death of the first of them to C in fee, is void, because it would defeat the survivorship given by the first words. So here, secondly, it was argued, That this remainder was void, being to begin upon a condition, whereof none should take advantage but the lessor and his heirs. Thirdly, that this remainder, being to begin upon a condition precedent, did not pass out of the lessor at the time of the livery, as all remainders ought, and therefore also was void. But on the other side it was argued and *adjudged*, that *first*, Here was no repugnancy; for it was not intended that if B died, living A, that then C should have the land immediately, but that then it should remain to C as a remainder, viz., after the death of A, and as B would have had it if he had lived. *Secondly*, that this was not a condition, but a limitation when the remainder should begin; for if it were a condition, it would go in restraint of the thing given upon something to be done or not done by the particular tenant, which here it does not: therefore if one makes a lease to A for life, upon condition that if B marries the daughter of the lessor during the estate for life, that then it shall remain to B, this is no condition to defeat or abridge the estate of A, but is only a limitation when and how the remainder to B is to take effect. So, if a lease were made to A for life, upon condition that if B pay to the lessor 20*l.*, that then after the death of A the land should remain to B, this is good, because it does not go in abridgment of the first estate; but if it was that then immediately upon such payment the land should remain to B, this would be void, because this would go in destruction of the first estate, without any thing to be done or not done by him, and of such condition the lessor and his heirs only can take advantage, not a stranger; and therefore the remainder to arise thereby is void. So, if a lease be made to two for their lives, upon condition that if one of them died within seven years, that then after the death of the other the land should remain to a stranger in fee, this is a good remainder, being not to begin upon a condition, but upon a limitation or *modus* appointed by the lessor. And they all agreed, that a remainder to begin upon an impossible or illegal limitation or condition would be void; as, upon a condition that if A, the first lessee, or if B kill a man, that then it should remain to him, these remainders shall never arise. So the case

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of Plesington, who made a lease for years upon condition that if he aliened the reversion, that then the lessee should have it to him and his heirs; this limitation was void, because repugnant, that when he aliened the reversion to one, the same alienation should carry the land to another. Also, the better opinion seems, that the remainder passed out of the lessor presently, and is carried into abeyance, to be executed when the contingency happens.

Plow. 23—29; Co. Lit. 378; Plowd. 29 a, 34 a, b; Perk. sect. 725, 729; Co. Lit. 378.

“But, though these words make no condition with regard to the precedent estate, yet as to the vesting of the estate in remainder to which they are annexed, they may properly enough be called conditions precedent. Therefore, where” ‘A by his will devised lands to B, his second son, and if he depart this world not having issue, then he willed that his land should remain over to another, and died; B had issue C, and died; then C died without issue; it was urged that the remainder could not take effect, because it was limited to take place on a condition precedent, which in this case had not happened: for B left issue, and so did not depart the world not having issue, as the words of the will are; yet, *per cur.* it was adjudged, that though literally he could not be said to depart the world not having issue, yet, since that issue died without issue, by the intent of the will, and the construction of law, he was dead without issue whenever the issue failed; as in a formedon in remainder or reverter, though the donee hath issue; yet, if after the estate-tail determines for want of issue, the writ supposes that the donee died without issue; *à fortiori* in case of a will, such construction shall be made to support the intent of the testator.’

“Leon. 285; 3 Leon. 106; Cro. Eliz. 26, *Lee v. Vincent.*”

‘So, where A upon marriage conveyed lands to the use of himself for life, remainder to his first and other sons in tail-male successively; and if he dies without issue male, then to the use of the daughters for one hundred years, for raising 1500*l.* for their portions; A had issue a son and a daughter, and died; and after the son died without issue; and if the daughter should have the term, was the question? And it was argued that she should not, because A did not die without issue male, for he left a son, though such a son after died without issue; and it could not be intended that whenever the issue male failed, that the daughters should have their portions, for that might be 100 years after, when all the daughters were dead; and such intention would make it ill in its creation. But it was answered and *adjudged*, that *quandocunque* the issue male failed, the husband in this case may be said to be dead without issue male; and the expectation of such a term in remainder is for their advantage in marriage; and such a term may be as well created to arise upon failure of issue male, as a power to sell upon failure of issue male; which hath been adjudged to be good.’ “Note: A case was cited, 13 Car. 1, between Brett and Pildredge, where a father, upon marriage of his daughter, made a provision, that if his daughter died without issue within two years, that then her husband should repay 500*l.* of her portion: the daughter had issue; and after, she and the issue died within the two years. It was adjudged, that the husband should not repay the 500*l.*, because, by the having of issue, the condition was fulfilled. Note: My Lord Chief Jus-

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tice Holt, in the case next after mentioned, said that the principal case of *Goodyer v. Clerk* was not put right in any of the books but Keble; for the true case was, that the husband before marriage, by a separate deed, made a lease for 100 years, to begin after his death without issue male on the body of his intended wife, in trust, for raising portions for daughters; and after made a settlement by lease and release, to the use of himself and his wife, and first and other sons, in the usual form, &c. And he said, this term being not subsequent to nor depending upon the estates limited by the settlement, but precedent in its creation, could not be barred by any fine or common recovery under the settlement. And though he did not deny but such lease was good, yet he thought it a very dangerous practice; and if such leases were countenanced, no purchaser under such settlement would be safe. But note; though such lease cannot be barred by a common recovery, because being precedent to the estate-tail, the recompense in value cannot extend to it, nor can he who recovers against the tenant in tail be supposed to have any right against the tennor, who comes in paramount the estate-tail; yet it appears by the books, that Manwood, Barnsley, and Twisden held, that if a common recovery be against the tenant in tail, such lessee for years *in futuro*, or upon a contingency, shall not be admitted to falsify within 21 H. 8, c. 15, to defeat the recovery; and then it remains at common law, and his term is subject to the power of the tenant in tail, as it was before that statute; which sufficiently takes off the objection from the danger of introducing perpetuities by the allowing of such leases. And in another book it is held, That if there be A, tenant in tail, remainder to B in tail, and B make a lease for years, or grant a rent-charge, such lessee or grantee cannot falsify a common recovery had against the first tenant in tail; because he who suffered the recovery was not chargeable with the lease or rent. And though, on the other hand, it may be objected, that by this construction all provisions for daughters or younger children made by such precedent lease for years may be defeated; to this it is answered, that the Court of Chancery will no doubt support such leases according to the trust thereof declared for daughters or younger children, but no further; and when that is satisfied, the term will then fall of course for want of power to falsify by the common law, and a further support in equity."

' Lev. 35; Vent. 229; Sid. 102; 1 Keb. 73, 78, 169, 246, 462, MSS., *Goodyer v. Clerk*.' || Vide observations on terms to commence after decease of a party without issue; taken from a MS. *pene*s Mr. Butler. Fearn, C. R. 7th ed. (Butler,) append. iv. In the above-mentioned MS. this case is cited by the name of Pilgrim and Brett plaintiffs, and Gold defendant. || "1 Keb. 247, 248, 463; 1 Sid. 102; Cro. Ja. 592; Sir T. Raym. 29; 1 Co. 62 b." || On this case Mr. Fearn observes, that as there was a preceding estate-tail, a recovery suffered by the tenant in tail would have barred this term and the daughter's portions; and therefore the allowing the limitation to take effect, was not running into the inconveniences of an executory devise limited on so remote a contingency, because this limitation was liable to be barred, whereas an executory devise is not. C. R. 476, (7th edit.) With regard to executory devises it is settled that a devise over on failure of heirs or issue generally is void for the remoteness of the contingency, (Ibid. 444, and cases there cited,) except where the devisee over is a relation of the first devisee, and capable of being his collateral heir, in which case the first devisee will only take an estate-tail, and then the devise over can take effect as a contingent remainder. Ibid. 466; 12 East, 253; 6 Taunt. 485; 4 Maul. & S. 61. In cases of executory devises of terms and other personalty, the courts lean to construe the words "dying without issue," to mean dying without issue *living at the person's decease*, in order thus to give effect to the devise over. Vide Fearn's C. R. 471. But in cases of realty, it seems, the construction is different, for there the interest of the heir at law is concerned. Ibid. 476; 1 P. Will. 663; 2 Term R. 720; 3 Ibid. 143; 7 Ibid. 589;

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9 Ves. 197; 4 Maul. & S. 61; and vide Mr. Douglas's note to Doe v. Fonnereau, Doug. 505. In this note Mr. D. states, that where there is a devise over after failure of heirs or issue of A, and there is a previous limitation to such heirs or issue, the principle of preventing perpetuities does not render it necessary to hold the devise over void in its creation; and certainly in the latter case, where the preceding limitation is expressly, or by implication, to *issue* only, there the devise over need not be held void; because it can only take effect as a contingent remainder, and consequently may be barred by the tenant of the previous estate-tail, which was the case of Doe v. Fonnereau. But where the previous limitation is to heirs, and passes the fee, there, in order to prevent a perpetuity, it is necessary to hold the devise over on failure of heirs void; for if it took effect it would be as an executory devise, and consequently it could not be barred by the tenant of the previous fee. Vide Fearn, C. R. 419, 420, and cases there cited; and vide title *Legacies and Devises*.||

“One makes a settlement upon marriage to the use of himself for life, remainder to trustees to support the contingent remainders during his life, remainder to his wife for life for her jointure, remainder to his first and other sons in tail-male successively; and then follows this clause—And in default of such issue, and in case he (the husband) shall die or be dead without issue male of his body on the body of his wife born, or in *ventre sa mère*, at the time of his death, having one or more daughter or daughters, then to trustees for five hundred years, in trust to raise portions for such daughter or daughters, also yearly maintenances to be paid half-yearly from the death of the wife. The husband has issue male by his wife, and also daughters, and dies; then the issue male dies without issue; and if the term should arise, was the question. It was argued by Serjeant Parker, that it should not, because it was to arise upon a condition precedent; for the having no issue male was restrained to a particular time, viz., the time of his death, which here did not happen. He agreed, if it had been, that if he die without issue male generally, there issue is *nomen collectivum*; and though he has issue, yet if such issue male after die without issue, either in his lifetime or at any time after, yet the term should arise, but not in this case, and cited the laws before mentioned. Raymond argued, that here was no contingency, but a plain limitation of the term after failure of issue male, whenever that happened; for when he says *and in default of such issue*, it is plain, if he had gone no further, it had been so then, when by those words the term would have been well raised, the subsequent words, which are but tautology and a repetition of the same thing, shall not hinder it from rising: for that would be to make one part of the deed destroy and subvert the other; and the words following, *and in case he shall die or be dead without issue male of his body on the body of his wife born*, if it had gone no further, are but a repetition of the former words, and *in default of such issue*. But then, if the words, *or in ventre sa mère at the time of his death*, shall be joined to all the foregoing words and be taken as part of them, then it destroys and contradicts them; for then all that is before spoken of issue male is to be confined to his death, as the operative words which govern and go through the whole sentence; therefore, he argued, that the words, *at the time of his death*, should be restrained and confined only to the words next immediately before, viz., *or in ventre sa mère*, for otherwise it is not to be known what he meant by *ventre sa mère*, nor at what time such issue male was to be *in ventre sa mère*, for all issues are *in ventre sa mère* at one time or other; therefore, to make sense of the deed, those words must be restrained, and then the whole is consistent and easy, and runs thus—*and in default of such issue, and in case he*

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shall die or be dead without issue male generally, or shall die or be dead without issue male in ventre sa mere at the time of his death; and then whether the issue male die at his death, or being *in ventre sa mère* at his death, and born after, die without issue male, the term shall arise, and no condition in it, but a plain limitation of a term in remainder. But my Lord Ch. J. Holt said, that by such construction you destroy the last words, which are restrictive and explanatory of the foregoing, and tied down to the time of his death. Also, the maintenances being appointed to be paid half-yearly from the death of the mother, show, that such maintenances and term were only to arise in case of no issue male at the time of his death; for otherwise, the interest being to be paid from the death of the mother, in case there should be a failure of issue male forty or fifty years after, the interest or maintenance would be more than the principal, fortune, or portion; and he was so strongly of this opinion, that this term was to arise upon a condition precedent, which here was not performed, that he said they might argue all the days of their lives, they should never make him change it. And accordingly judgment was there given that the term should not arise. But afterwards, upon a writ of error brought in parliament, that judgment was reversed.

Trin. 1706, in *B. R., Stroud v. Andrews*;" [S. C. Rep. temp. Holt, 625; and 11 Mod. 88. But the report here is apparently from a different hand, and is in some respects more full.] ¶ *Vide Thellusson v. Woodford*, 4 Ves. jun. 240, 312; 1 New R. 385, 386; where the rule, "*Ad proximum antecedentem, fiat relatio nisi impediatur sententia*," was much discussed; and the words in the will, "as shall be living at the time of my decease, or born in due time afterwards," were not restricted to the class of persons last antecedent, but were applied to all such of the previously described classes to whom it was necessary to apply them in order to effectuate the manifest intention of testator.¶ "2 Journ. 702; 5 Feb. 1706."

"A makes a settlement upon the marriage of his son with one B to the use of the son for life, remainder to trustees to support, &c., remainder to the first and other sons in the usual form, and adds this proviso, viz. : *Provided that if the said B shall happen to survive her husband, not having issue of their two bodies lawfully begotten, then she, the said B, should have power to sell and dispose of such part of the lands as she should think fit*. The husband dies, leaving issue; some years after that issue dies without issue; and then the wife sells the lands in question to the defendants, against whom the heir at law of the husband brought this bill to have a discovery of the deeds and writings; and insisted that the wife had no power to sell these lands, because the condition was not performed; for the husband left issue, and so she did not survive him, not having issue. But my Lord Chancellor said, that when an estate is made to one and the heirs of his body, and in case he die without issue, to go over to another, that limitation over is good, though he dies leaving issue, which issue afterwards dies without issue. And that is a stronger case than this; for if he leaves issue, he cannot be properly said to die without issue, though that issue after fails; because death is a single act, and to be performed but once; but here, surviving is a continuing act, and she survives her husband as much a year after as she did the first moment; and therefore, if the issue fails during her life, she actually survives without issue, or not having issue, because the issue fails during her survivorship, which continues after the failure of issue. And this, he said, was the plain natural meaning of the parties, as well as agreeable to the words, which were to give the wife a power to dispose of so much of the lands, in case the issue to be provided

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for by that settlement failed during her life; and accordingly dismissed the bill.

Holt v. Burleigh, Pasch. 18 May, 1710;" [Pr. Ch. 293; S. C.; 2 Vern. 651, S. C.]

"One Fletcher, being possessed of a term for years, by his will devises it to his wife for life, and after her death to Rebecca Fletcher for life, and after her death to Thomas Fletcher and his children; and if it shall happen the said Thomas Fletcher to die before the expiration of the said term, not having issue of his body then living, then to go over to the now plaintiff for the residue of the term. The defendant's title was by an assignment from Rebecca Fletcher, and a release from Thomas Fletcher, of all their estate, title, and interest respectively in and to the premises: the two life-estates were at an end: and Thomas Fletcher was dead without issue; and now the plaintiff brought this bill to have an assignment of the residue of the term, pursuant to the will. All that was insisted on for the defendant to difference this case from the Duke of Norfolk's case of a term, and from Pell and Brown's case of a fee, was that this contingency of his dying without issue then living was not confined to his death, but that the words then living should relate to the words before the expiration of the term; and so this went further than any of the cases had ever yet been carried, for he might have issue for several generations, and yet, if that issue failed at any time before the expiration of the term, then it was to go over; and this in a long term plainly tended to a perpetuity, and therefore ought not to be allowed; but that, by the devise to Thomas and his children, and the words if he die without issue, the whole term and interest was vested in him, and he might dispose thereof as he thought fit. And that it could not be restrained by the words *then living*, for they related only to the expiration of the term, &c.; so the remainder over to the plaintiff was void. But it was agreed to be a good remainder to the plaintiff, by way of executory devise; and that the words *then living* must relate to the time of his death, for otherwise there would be no difference between this case and the common limitation of a term to one and the heirs of his body, and if he die without issue, to remain to another, which is void; for there it must likewise be intended if he die without issue before the expiration of the term, because when the term is expired, nothing remains to limit over: but, here, being limited over upon this contingency, viz., *If he die without issue then living*, viz., *at the time of his death*, it is good, because the contingency must happen within the compass of one life, or not at all, and will be certainly known at his death. And this case differs in nothing material from the Duke of Norfolk's case.

Fletcher's case, Trin. 12th July, 1709, in Ch." [1 Eq. Ca. Abr. 193; S. C. Fearne's Ex. Dev. 470, (7th edit.)]

"In this case it was said by my Lord Chancellor to have been decreed in this court, and several cases cited for it, that where an estate is limited to a man for life, remainder to his wife for life, remainder to trustees for a term of years, upon trust out of the rents and profits, or by mortgage or sale, to raise portions for daughters of that marriage, to be paid at their age of 18 years, or day of marriage, which should first happen, that these portions were absolutely due and vested at 18 or marriage, though in the life of the father and mother; and that the term for raising them should be sold in the lifetime of the father and mother, and this court would warrant the title. So, if the trust of the term were limited upon a

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condition precedent, as if it was declared, that in case he should die without issue male on the body of his said wife, leaving daughters, that then the trustees should, out of the rents, &c., raise and pay portions to such daughters at 18 or marriage, &c.; that in case the mother died without issue male, leaving daughters, who attained 18 or were married in the father's lifetime, that such term in remainder should be sold presently, and the portions raised. So, where even the term itself was to arise upon such condition precedent, or, after a limitation to the first and other sons or before, it were limited, that in case he should die without issue male on the body of his wife, leaving daughters, then to trustees for a term of years, in trust to raise portions for daughters, payable at 18 or marriage, yet after the death of the wife without issue male, such term shall be sold to raise the portions in the father's lifetime. The reasons of which resolutions, he said, were, because the death of the wife, which was all that was contingent in that case, had happened; that it was now become impossible he should die leaving issue male by her, and then it was no more than if it had been limited when he shall die, or after his death. And the reason of the court's coming into this at first was, to promote suitable matches, and that women might have their portions when they were likely to do them most service; though he said, if it had been *res integra*, he should not have decreed it so.

Corbett v. Maidwell, Trin. 1710, in Chancery; [1 Eq. Ca. Abr. 337, S. C.; 1 Salk. 159, S. C.; 2 Vern. 640, 655, S. C.; 3 Ch. Cas. 190, S. C. Although this case, and the cases on which it was founded, have been constantly received as the law of the court, yet judges in later times have expressed their opinion of the inconvenience attending these determinations, and have anxiously sought for circumstances to distinguish the modern cases from them. Butler v. Duncombe, 1 P. Wms. 448; Sandys v. Sandys, Ibid. 707; Reresby v. Newland, 2 P. Wms. 93; Ravenhill v. Dansey, Ibid. 179; Brome v. Berkley, Ibid. 484; Evelyn v. Evelyn, Ibid. 679; Hebblethwaite v. Cartwright, Ca. temp. Talb. 31; Stanley v. Stanley, 1 Atk. 549; Hall v. Carter, 2 Atk. 354; Stevens v. Dethick, 3 Atk. 39; Lyon v. Duke of Chandos, Ibid. 416; Goodall v. Rivers, Mos. 395; Churchman v. Harvey, Amb. 335; Smith v. Evans, Ibid. 633; Conway v. Conway, 3 Br. Ch. R. 267.]

(F) Of Cross Remainders, or those arising by Implication and Construction of Law.

"THE last thing to be treated of under this head is concerning remainders arising by implication or construction of law, and therein of cross remainders. But these being already settled under the head of DEVISES, as being allowable only in last wills and testaments, I shall pass them by."

A having issue five sons, his wife being *enceinte*, devised two-thirds of his lands to his four younger sons, and the child *in ventre sa mère* if he were a son, and their heirs; and (a) if they all died without issue male of their bodies, or any of them, that the lands should revert to the right heirs of the devisor. By this devise the younger sons are tenants in tail in possession, with cross remainders in tail to each other, and no part shall revert to the heirs of the devisor till all the younger sons be dead without issue male of their bodies.

Dyer, 303. (a) That each shall be heir to the other, makes cross remainders. Hob. 33; and vide Cro. Ja. 260, 656, 695; Bulstr. 62; Owen, 25; And. 38; Savil, 92; Moor, 637; Raym. 455; Vent. 224.

But, where one having issue three sons, A, B, and C, devises one house to A and his heirs, another house to B and his heirs, and a third house to C and his heirs, provided that if all his said children should die without issue, that then all the said messuages should remain and be to his wife

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and her heirs; it was held by three judges, that upon the death of one of the sons without issue, the wife might enter, and that here there were no cross remainders from one son to another, because being devised to them severally by express limitation, there shall be no greater estate to them by implication. But Lee, C. J., doubted; and Doddridge, J. said, that though perhaps cross remainders may be by *implication* where there is a devise to (a) two several persons, yet not so if to more; for when one dies there cannot be several estates by moieties to several persons, and when another dies, remainder again to another, because of the uncertainty and inconvenience; and that it was never seen in any book, where an estate is limited to divers, that there could be cross remainders.

Cro. Ja. 655; 2 Roll. R. 281; Gilbert v. Witty, Cart. 173, S. C. cited and admitted to be law. (a) As in 4 Leon. 14." [Vide *infra*.]

One seised of lands in fee, by his will in writing devises Blackacre to A his daughter and her heirs, and Whiteacre to his daughter B and her heirs; and if she die before the age of sixteen years, living A, then A shall have Whiteacre to her and her heirs; and if A die, having no issue, living B, then B shall have the part of A to her and her heirs; and if both die, having no issue, then to J S and his heirs, and dies; B attains her age of sixteen years, and then dies without issue in the life of A. And first it was held by three justices against Dyer, That the daughters had an estate-tail upon the whole will, and not a fee determinable upon a contingent subsequent. *Secondly*, That by the words, *if both die without issue*, no cross remainders in tail were created by implication, but that upon B's death without issue, after sixteen, J S should have her part presently without staying till the death of A without issue.

Dyer, 330; Benl. 212; Roll. Abr. 839; Vaugh. 267, Clatche's case. *β* See Hauer v. Sheetz, 2 Binney, 532; Robinson v. Adams, 4 Dallas Append. xii.; Neave v. Jenkins, 2 Yeates, 414; Way v. Gest, 14 Serg. & R. 40; Stehman v. Stehman, 1 Watts, 466.*g*

A seised of lands in fee, by his will devises all his lands in the county of—— to his two daughters B and C and their heirs, equally to be divided betwixt them; and in case they happen to die without issue, then he devises the said lands to his nephew J S, and the heirs male of his body, and dies. It was adjudged, that upon the death of B, one of the daughters, the other sister took her moiety as a cross remainder.

Raym. 452; Skin. 17, pl. 19; 2 Jon. 172; 2 Show. 136, pl. 115; Pollex. 434, S. C., Holmes v. Meynell; and vide 2 Vern. 545; 3 Mod. 107.

β E being seised of lands in the state of New York, devised the same to his son J in fee, and other lands to his son M in fee, and added, "it is my will, and I do order and appoint that if either of my sons should depart this life without lawful issue, his share or part shall go to the survivor, and in case of both their deaths without lawful issue, then" devise over to brother and sister of testator. J died without issue leaving M survivor, who afterwards died without issue; held, that J took an estate in fee defeasible on the event of his dying without issue in the lifetime of his brother, that the limitation over was good, as an executory devise, and the estate in the death of J vested in his surviving brother M.

Jackson, Lessee of St. John, v. Chew, 12 Wheat. 153.*g*

It hath been said in a great variety of cases, that cross remainders can

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never arise between more than two, from the great confusion it would otherwise create.

Cro. Ja. 655; Vent. 224; Raym. 455; Fitz. 97; Shaw v. Weigh, 2 Jon. 82. [This doctrine, that there cannot be cross remainders created between more than two persons, seems exploded. The rule now settled is, that where they are to be raised between *two*, the presumption shall be in favour of them; but where between *more than two*, it shall be against them. But it being only a presumption, it may in either case be rebutted by circumstances of plain, manifest intention. The words "*in default of issue*," and a devise over of all the testator's estates, have been holden to raise cross remainders. Phipard v. Mansfield, Cowp. 800. Coembr v. Hill, *infra*; Atherton v. Pye, 4 Term R. 710; Wright v. Holford, Cowp. 31, S. C. by the name of Wright v. Englefield, AmbL. 468, and by the name of Wright v. Lord Cadogan, 6 Br. P. C. 156; Holmes v. Meynell, *supra*; Marryatt v. Townly, 1 Ves. 102. The disposition of the courts to presume against cross remainders, arose from their dislike to the splitting of tenures. 1 Ves. 164, 165.]

It is clearly agreed, that cross remainders can only arise in last wills, and are not to be allowed of in any deed or conveyance.(a)

Co. Lit. 25; Roll. Abr. 837; 2 Show. 136, pl. 115. [(a) This doctrine is not correctly stated, nor is it supported by the authorities to which it appeals. Cross remainders, it is true, cannot arise in a deed by implication, Cole v. Livingston, 1 Vent. 224; Doe v. Dorrell, 5 Term R. 521; but they may be raised in a deed, where they are limited in express, though perhaps rather informal, terms. Doe v. Wainewright, 5 Term R. 427. Indeed, in executory articles, Lord Camden went farther; for in the case of articles upon a marriage to lay out the wife's fortune, to the use of all the children of the marriage as tenants in common and of their respective heirs, and for default of such children and their issue, to the use of the survivor of the husband and wife; his lordship held, that they were cross remainders. Twisden v. Birt, Nolan's edit. of Strange, vol. ii. 970, note (3); S. C. Ambl. 663, by the name of Twisden v. Locke.]

|| But it is now settled, that though cross remainders cannot be implied in a deed, they may be created by the express words of the deed.

See 1 Saund. R. 186, note, and Mr. Butler's note, Co. Lit. 195 b, as to the proper words to raise cross remainders in a deed.

Where the limitation in a marriage settlement was "to the use of all and every the daughter and daughters of L C on the body of the said M lawfully to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters, lawfully issuing, and for *default of such issue*, to the right heirs of L C for ever;" it was held, that though it was probably intended that no part of the settled estate should go over, as long as there was any issue of the marriage remaining, yet the parties had not said so in such words as the law requires to express such an intention in deeds, and it was an established rule that cross remainders could not be *implied* in a deed.

Doe v. Worsley, 1 East, 416.

So also, in Meyrick v. Whishaw, the deed, after limiting estates-tail to all the children of F W as tenants in common, continues in these words, "and for default of such issue, and if any of such children, there being more than one, shall happen to die without issue of his or their bodies or body before he, she, or they shall attain the full age of twenty-one years, that then and in every such case the part and share, parts and shares, of every such child and children so dying shall go and remain and be to the survivors and survivor of such children, and the heirs of the bodies, and body of such survivors and survivor as tenants in common, and not as joint tenants; and in case all such children should die without issue of his, her, or their body or bodies, then to the use of F W, his heirs and assigns for

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ever." F W had two children, Luke and Mary Anne. Luke died after attaining the age of twenty-one years without issue. And the court held, that under those circumstances, Mary Anne did not take by way of cross remainder, but that Luke's moiety went to the devisees of F. W.

Meyrick v. Whishaw, 2 Barn. & A. 810. ^βSee Hauer v. Sheetz, 2 Binney, 532; Cheeseman v. Wilt, 1 Yates, 411; Robinson v. Adams, 4 Dallas, Append. xii.g

So, where there was a similar settlement, and there were two children, one of whom died after attaining twenty-one without issue, it was held that the other did not take by way of cross remainder, but that the moiety of the deceased went to the heir of the settlor.

Levin v. Weatherall, 1 Brod. & B. 401; 4 Moo. 116; and see Edwards v. Alliston, 4 Russell's R. 78.||

Richard Holden seised in fee, and having issue a son and three grandchildren, by his will devised part of his estate to his wife for her life, and the reversion of such part expectant on her death, and all other his freehold tenements, &c., he gave to his son Richard Holden for life, and after his death to his first and other sons successively in tail-male; and for default of such issue, and after the determination of the said estates, he gave the premises to his grandson Richard Holden and his grand-daughter Elizabeth Holden, to be equally divided between them, and to the heirs of their respective bodies issuing; *and for default of such issue* he gave the premises to his grand-daughter Anne in fee: the testator died seised, Richard the son died without issue male, whereupon Elizabeth and the grandson entered, and Elizabeth died without issue generally: Anne Holden married John Jervis; and the question was, Whether there were cross remainders between Elizabeth and Richard the grandson, or whether the moiety of Elizabeth should go to Anne or Richard? And it was resolved, That there were no cross remainders between them, because here are no express words, nor is there a necessary implication, without either of which cross remainders cannot be raised; that the words, *and for default of such issue*, being relative to what goes before, mean only and for default of heirs of their respective bodies, and then it is no more than as if it had been a devise of the moiety to Richard and the heirs of his body, and of the other moiety to Elizabeth and the heirs of her body, and for default of heirs of their respective bodies, remainder over; in which case there could be no doubt. And it was held, that this case differed from the case *suprà* of Holmes and Meynell, the word *respective* being wanting in that case, and the first devisees were the testator's daughters, and the remainder-man only a nephew; whereas in the present case Anne was as near to the testator as Richard.

2 Stra. 699; Ca. temp. Hardw. 22; 2 Barnard. B. R. 367, 443; 2 Kel. 188, Comber v. Hill, Pasch. 7 G. 2, in B. R. and M. 8 G. 2, a like case in B. R. between Brown v. Williams, 2 Str. 996; {1 East, 229, Doe v. Cooper;} [Davenport v. Oldys, 1 Atk. 579; Cowp. 799; Marryatt v. Townly, 1 Ves. 102.] {Vide 2 East, 36, Watson v. Mary Foxon.}

[R. H. devised to his six nieces to be equally divided between them, share and share alike, as tenants in common, &c., and of the several and respective heirs of the body and bodies of all such and every his said nieces; and in case one or more of his said six nieces should happen to die without issue of her or their bodies, then he gave, &c., the share or shares of her or them so dying without issue to the survivor or survivors of them his said six nieces, share and share alike, as tenants in common,

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&c., and to the several and respective heirs of the body and bodies of such survivor or survivors of them; and if all his said nieces should die without issue, then he gave, &c., all the same manors, &c., unto his own right heirs for ever. It was admitted, that the original share went to the survivors by way of cross remainders, but it was insisted that the shares which the two last dying nieces took by way of accruer did not survive.

Leach v. Jackson, *coram* Ld. Apsley, Tr. 11 G. 3, in Chancery; Nolan's edit. of Strange's Reports, vol. ii. 970, note (3.)] ||As to cross-remainders in wills, see tit. *Legacies and Devises*, (1,) vol. vi.]]

(G) "Of vested Remainders, and of the particular Estate to support them in their Creation; how long it must continue; and when by Determination, Grant, or Refusal thereof, the Remainder is discontinued, barred, or destroyed, and when not.

"As to a vested remainder, we are to consider, first, The nature of a remainder vested, that there must be a particular estate to support it in its creation; wherein to consider, 1st. What estate is sufficient for that purpose, when it must begin, and how long it must continue. 2dly. When by determination, grant, or refusal thereof, the remainder is discontinued, barred, or destroyed, and when not; and therein of the remedies for him in the remainder or reversion by entry, action, or receipt. 3dly. Where the remainder or reversion shall be subject to the acts or charges of the particular tenant, and where and how the charges of him in the remainder or reversion shall take place.

"It has already appeared what estate is sufficient to support contingent remainders, and what not. As to remainders which vest presently, though there must be a particular estate to distinguish them to be remainders, yet, as to supporting them, there needs none; because they vest presently and certainly as remainders in the person to whom they are limited. And I find only one estate whereon it is held no remainder can depend; and that is an estate at will; for if such estate be made with remainder over, the remainder is void. The reason seems, because by the limitation over the will is instantly determined, and then the remainder cannot be good for want of a particular estate whereon to depend; and in possession it cannot be good, because it was limited as a remainder.

8 Co. 75.

"A remainder may be limited upon a gift in frank-marriage either to the donees themselves, or to a stranger. But the diversity taken in the books is, that if the remainder be limited over in fee, then is the frank-marriage destroyed, and the donees have no estate-tail but only for life; because by the limitation over of the fee, the tenure of the donor, which is inseparable to frank-marriage, is destroyed, and then the words of the gift carry but an estate for life. But if the remainder were limited over in tail only, or for any less estate, yet the frank-marriage continues; because the tenure by reason of the reversion left in the donor continues.

Co. Lit. 21 b; Godb. 19, 20.

"If one make a lease to A for life, remainder to him for years; or to A for his own life, remainder to him for the life of B; these are good remainders, and both estates are vested in A; for though he can have no benefit of the remainder in his own person, yet he may give, grant, devise, or assign either estate, and a greater estate may support a less, as in those cases, but not *à converso*; therefore, if one makes a lease to A for years, remainder to him for life, the lease for years is drowned.

Co. Lit. 54 b; Dyer, 310 a; Cro. Eliz. 491; 3 Leon. 22.

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“Another rule is, that the remainder must be limited and given out at the same time that the particular estate is created; for otherwise the reversion settles immediately in the lessor or feoffor, and draws to it the rents and services, and then the remainder limited after comes too late. Therefore, if one makes a lease for life, and after confirms his estate for life, remainder after his death to another, this remainder is void; because the confirmation gave no new estate to the first lessee, or any ways enlarged his old estate, but he continued tenant only for his own life, as he was before, and then the remainder cannot be good, because it was limited after the particular estate had taken effect, whereby a reversion was vested and settled in the lessor: and as a grant of the reversion it is not good, because not so intended. And some of the books add another reason that it cannot be good as a grant of the reversion, because he was not party to the deed; and unless it be by way of remainder, none can take but those who are parties to the deed. But Littleton seems to reject this reason, where he holds, that in such case, if the tenant for life accepts the deed of confirmation, the remainder is thereby in him, to whom it is limited; because such acceptance is an agreement and attornment in law of the tenant for life; though without the deed he in remainder cannot maintain an action of waste, or have any other benefit against the tenant for life. But this reason seems rather to prove that the deed operates as a grant of the reversion, to which attornment is requisite; for to a remainder there needs none, because it takes effect by the same deed, and at the same time with the particular estate; and therefore his advice is for him that is to have the remainder, to get another part of the indenture to himself.

Doct. & Student, lib. 2, c. 20; 1 Bro. 253, pl. 45; Plow. 25 b; 2 Roll. Abr. 415, pl. 8; Lit. sect. 573; Co. Lit. 317; Plow. 160 b; Dyer, 126 b.

“If the lessor disseise his tenant for life, and after make a new lease to him for life, remainder over, this remainder is void; because the tenant for life is remitted to his first estate for life, which was long before the remainder was appointed; and then, as a remainder, it cannot be good, because there was no particular estate created at the same time with it. So, if the heir endow his mother, remainder over, the remainder is void, though livery be made; because the dower hath relation to the death of the husband, which was before the appointment of the remainder. But, if the lessor disseise his lessee for life, and make a lease to a stranger for the life of the first lessee, remainder over, and then the first lessee enter and be remitted, yet the remainder continues good; because it was well vested before the entry and remitter.

Plow. 25 b; Godb. 355.

“If a lease be made to A for life of B, and after the lessor confirm the land to A for his own life, remainder over, this is a good remainder; because, by the confirmation, the estate of A was enlarged and made absolute for his own life, which before was determinable upon the death of B; and by such confirmation a new estate being created, a remainder may be limited upon it, as it might at making the lease. So, if confirmation be to the tenant for life in tail, with remainder over, this is good for the same reason; because the estate for life is enlarged to an estate in tail, upon which a remainder may be limited, as it might upon the first making of such estate.

Doct. & Stud. lib. 2, c. 20; 1 Bro. 253, pl. 45; 2 Roll. Abr. 415, pl. 8.

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"So, if a woman be tenant for life, and the lessor confirm the estate of the husband and wife for their two lives, this confirmation enures to the husband by way of remainder for life; or, at least, by way of increase and enlargement of the estate of the husband; and the estate for life of the wife continues distinct. But some call this a reversion in the husband, and not a remainder, because the estate of the wife is not enlarged thereby; and this remainder did not pass till after the reversion vested and settled in the lessor.

Cro. Car. 478; Dyer, 126; Lit. sect. 525; Co. Lit. 299; 1 Lev. 38; Plow. 31 b; 1 Sid. 83, 361.

"A, copyholder for life, remainder to B in fee: B surrenders this copyhold to the use of A for life, remainder after his decease to the use of B and C his wife for their lives, and the life of the longer liver of them, remainder to the use of the right heirs of B. It was argued, that this surrender to the use of A for life was void, because he had an estate for life before; and then the remainders limited thereon are void also; and then the surrender enures to the use of B and his heirs, as it was before, and C took nothing by it. And though a lease to A for life, remainder to B for the life of A, of lands at common law be good, because A may forfeit his estate for life, whereof B shall take advantage and hold during the life of A; yet it is otherwise in case of copyholds; for there the lord of the manor shall take advantage of the forfeiture, and hold during the life of the particular tenant, and not he in reversion or remainder. And so here, the first estate being void, to give A any benefit, the remainder must be void too. On the other side it was argued, that if the estate limited to A was void, yet the limitation to B and his wife was good by way of present estate and surrender of the remainder, as a grant of the reversion *cum post mortem* of the tenant for life *acciderit* hath been construed a good grant *in presenti* of the reversion; and the words *cum post mortem* refer to the having the land in possession. So, here B and C shall have the land for their lives in possession after the death of A, as by a mediate settlement, and not by way of remainder. And so was the opinion of the whole court, as Saunders reports it; and that it was not good by way of remainder. But Siderfin reports it to be held by three justices good by way of remainder; and the reason there given for it is, because, say they, the continuance of the particular estate *in esse* is not always necessary; as if a rent be granted to the tenant of the land for life, remainder over, this is good. So, an estate limited to an infant, remainder over, and the infant at full age disagrees to the estate for life. So, they thought, if a copyholder in fee surrenders to the use of the lord for life, remainder over, this is good. So, if tenant for life and he in the reversion grant their estate to the tenant himself for life, remainder over, this is good. But *quære*, if these cases warrant such construction; for in the case of the rent, though between the parties, it merges presently in the land as soon as granted; yet, as to all strangers, it hath continuance, and the grantee himself hath a continuing benefit by way of exoneration of his estate therefrom. As to the case of the infant, though he refuses at full age, yet that shall not divert the remainder, which was once well vested by good title; but he in remainder shall enter presently, as in his remainder upon such refusal, because there was a good estate to support it in its creation. As to the case of the surrender to the lord, he hath benefit by actual possession of the land during the estate thereby surrendered, and may grant it out again

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for his own life, though, whilst it is in his own possession, he cannot properly be called a copyholder thereof, because he cannot be said to hold of himself. And as to the last case, if it were barely by way of grant, it cannot be good, because the freehold cannot pass without livery; and if livery were made by parol, it then amounts to a surrender of his estate for life; and a new estate for life is created by the same livery, upon which a remainder may be limited, as it might have been at first. But if it were by deed and livery, it should seem it cannot be good; because then every one passing only his own estate, the tenant for life cannot give an estate to himself; but by his joining in the deed and acceptance thereof, this may, as appears before, amount to an attornment, and then the grant, as to the other, will pass the reversion. But in the principal case, the surrender by him in remainder cannot pass the reversion, because he has it not as a reversion, but as a remainder. And for the same reason the acceptance of the particular tenant cannot amount to an attornment, (if it were necessary, which, in case of a copyhold, being an estate at will only, seems not requisite,) because no reversion is granted or surrendered; and then his estate continuing in all respects the same as it was before the remainder, as a remainder it cannot be good, though by way of present grant, to take effect in possession after the death of A, it may.

1 Saund. 149; 1 Sid. 360; 2 Keb. 341, *Wade v. Batch*; Cro. Eliz. 323; Dyer, 367; Co. Lit. 298; 2 Brownl. 155; 2 Roll. Abr. 415, pl. 2, 3; Dyer, 140, b, pl. 41. held, this remainder of the rent not good, because the particular estates suspended are as soon as granted. But Co. Lit. 298 a, *contra*, that it is good, and vests in an instant, and the suspension in judgment of law grows after. So, those books hold the remainder of a seignior granted in such manner void for the same reason; and because no *formedon in remainder* lies without alleging the esplees in the particular tenant. *Ideo quære*.

“A, tenant in tail, remainder to B in tail: by indenture enrolled for 20*l*. bargains and sells the lands, and all his estate, right, title, &c., to C during the life of A, remainder to the queen, her heirs and successors. This remainder was held void; first, because there was no particular estate; for the grant to C was absolutely void, because it can never take effect in possession, nor can C have any benefit by it, A having an estate-tail therein, which is subject to no forfeiture to let in the remainder, and his entry into religion, which is a foreign possibility, and against law likewise, shall never be presumed. Secondly, B having granted *totum statum suum* to C, left nothing in him to limit over, and therefore the remainder is void, either because C took nothing, and then a remainder cannot be without a particular estate, or, if C took any thing, he took the whole, and nothing remained to limit over to the queen; and, by consequence, such remainder is void. And as a grant of the reversion it cannot operate, because B had no reversion, but a remainder only.

2 Co. 50, Mo. 342, Sir Hugh Chomley's case.

“Husband makes a feoffment in fee to the use of himself for life, remainder after the death of his wife to B, and dies; then the wife dies; and if this remainder to B was good, was the question. The court seemed to be of opinion that it was not; because during the life of the wife, it did not vest: and admitting that the wife had an estate for life by a former conveyance, (a) as the case in fact was, yet that could not support a remainder, which was not created at the same time with it. On the other side it was argued, that here was no contingency but a remainder vested, and a difference was taken between a remainder at common law and by the statute

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of uses. This is the case *verbatim* as it is reported ; but no judgment was given, but it seems the remainder must be contingent, and upon the wife's surviving her husband became void ; because by his death the particular estate was determined, and yet the remainder could not then take effect ; and the estate of the wife by a former conveyance could be of no regard, if it had had continuance, as it had not, being, by the feoffment, divested and put to a right.

Sir T. Jo. 124, *Key v. Gamble*." ||(a) So, in *Doe dem. Fonnereau v. Fonnereau*, Doug. 487, it was decided that an estate for life to A in a deed and an estate to the heirs of his body in a will did not unite, so as to give A an estate-tail ; and vide *Fearne*, 302, (7th edit.)||

"My Lord Coke lays down for a rule, that when the particular estate and remainder depend both upon one title, there the defeating of the particular estate is a defeating of the remainder also ; but, when the particular estate is defeatable only, and the remainder by good title, there, though the particular estate be defeated, yet the remainder continues good : as, if A be lessee for life, and the lessor disseise him, and make a lease to B for the life of A, remainder to C in fee ; though A enter, and defeat the estate for life, yet the remainder to C being once well vested shall not be defeated ; for it would be unreasonable, that the lessor should have the land again, and contrary to his own livery. And in this case the remainder depends upon the same life it did at first, though that estate for life be in another person. And he there put also the case of the infant before mentioned, disagreeing at full age.

Co. Lit. 298 a.

"If one grant a rent to A for the life of B, remainder to the heirs of the body of B, this is a good remainder ; because it takes effect at the instant of the determination of the particular estate, as all remainders ought, or during the particular estate.

Co. Lit. 298 a.

"If one makes a lease to A for the life of B, remainder to C in fee ; A dies ; now till an occupant enters there is no particular estate, and yet the remainder to C continues good, because it vested in C presently by the first limitation ; and the want of a tenant to the first estate shall not vitiate the estate to the second, which was well vested.

Co. Lit. 298 a.

"If rent be granted to A for life of B, remainder over ; if A dies, he in remainder shall have the rent presently ; because the estate for life in the rent determined by the death of A, and there can be no occupant of a rent. But *Yelverton* holds, that in the case of *terre-tenants* they shall have the lands during the life of B discharged of the rent, and this is sufficient to support the remainder.

Mo. 664 ; *Yelv. 9, Salter v. Bottler*.

"If one grant a rent to the right heirs of J S, who is then living, remainder over, this whole grant is void ; for J S cannot have heirs during his life, and so there is no person to take the particular estate, and without that there can be no remainder ; and therefore that is likewise void. So, if a lease be made to J S for life, where there is no such person, remainder over, the whole is void for the same reason. So, if a lease be made to a monk, or other person, who has no capacity by law to take, for life or years, remainder over, both are void. But in all these cases, if such estate

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were devised by will, he in remainder should take presently. So, if the first devisee refuse, or die in the lifetime of the devisor, the remainder shall vest in possession presently. The reason of which difference is, because in a will the intent of the devisor is principally to be regarded; and if the particular estate fails, the devise over shall be construed as a new original devise to support the intent of the testator, and let in the *hæres factus* according to the estate thereby given him. But if one by his will devise, that his feoffees shall make an estate to A for life, remainder to B in fee; if A refuse, the feoffees ought to make an estate to another for the life of A with remainder to B in fee. And so if one devise that his executors shall make such estate, and A refuse, yet B shall not have the remainder presently; because here he hath referred the estates to be made by the rules of the common law, and therefore they ought to be pursued. But *quære* in these cases, if the estates ought not to be made to A pursuant to the will, which, though he refuse, will, *volens volens*, carry the estate to him with remainders over, and then, if he after refuse to take such estate, the remainder will vest in possession presently. But it is likewise held, that if a devise be to A for five years, remainder to B in fee, and A die in the lifetime of the devisor, that this shall descend to the heirs of the devisor in the mean time, till the five years are past, and then B shall have it, as by a new original devise. But *quære* in all cases of wills, since the intent of the party is to be the principal guide, if it appears that the remainder is not to take effect till such a determinate future time, why should it not in the mean time descend to the heir at law, and so of the use; and when the time is expired, take effect in the devisee in remainder as a new original executory devise?

Perk. sect. 55, 567, 568, 569; 1 Bro. 235, pl. 5; Plowd. 35 a; 2 Roll. Abr. 415, pl. 4, 5, 6, 7, 417, pl. 9; 1 Roll. R. 138; Swinb. 125; Mo. 519; 1 Leon. 195, 196, 198; 2 Bulst. 292; Raym. 162; Dyer, 122, pl. 20, 127; 310, pl. 79; Plow. 244, 414 a; Godolph. 356, (6,) 357, (13,) 358, (19,) (25,) 462; Cro. Eliz. 423, Fuller v. Fuller.

“If one give lands to A in tail, remainder to himself for life or years, remainder to B in fee; this remainder to himself is void; because none can give lands to himself; and yet the remainder to B is good, because there is a particular estate to support it. So, if the first remainder were to a monk or other incapable person, remainder over, this last remainder is good, and shall take effect in possession, upon the determination of the particular estate, without any regard to the mesne remainder, which was void. But *quære*, if there be not a diversity between such remainder limited to himself by fine; for some of the books seem to hold it good by estoppel in such case; but how that can be I do not know; for estoppels are generally to conclude the party to his prejudice, when he does a thing, or grants an estate he had no right to; yet, having so granted it, he shall not afterwards be admitted to invalidate and make it void, by saying he had no power to make it.

1 Bro. 253, pl. 35; Perk. sect. 566, 705; Godolph. 359, (20;) 1 Leon. 197, 198; 1 Bro. tit. *Estates*, pl. 23, 66; Dyer, 309, (69,) pl. 32, pl. 14; 2 Mod. 210; 1 Leon. 195, 196, 199, 200.

“Another diversity is between a feoffment to uses, and a covenant to stand seised to uses; for if one makes a feoffment in fee to the use of A for life, remainder to the right heirs of J S, who is living, here the remainder passes out of the feoffer presently, and is carried into abeyance, till the death of J S; because by the feoffment he departed with the whole estate,

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and left nothing in him. But, in case of a covenant to stand seised to such uses, nothing passes out of the covenantor but what can then vest in the covenantees.

1 Co. 101 a, 154 b; Mo. 195, 520; Plowd. 307; 2 Sid. 66, 157; 2 Lev. 77; 2 Mod. 209, *Ld. Paget's case*.

“So, if a feoffment be to the use of A for life, remainder to B for life, remainder to C in fee; if A refuse, B shall take his remainder in possession presently: but upon a covenant to stand seised, if A refuse, B shall not take presently, but the covenantor himself shall retain it during the life of A. So, if the first estate were void, as a covenant in consideration of long acquaintance to stand seised to the use of A for life, and after his death, in consideration of consanguinity, to the use of B in tail, or fee; here the first estate is void, for want of a sufficient consideration to raise the use to A. Yet B shall have no use till the death of A; but the covenantor shall retain the land during the life of A. The reason of which diversity is, that in case of the feoffment he divested himself of the whole estate, and therefore against his own solemn livery can have nothing further therein; and the feoffees, being only instruments, through whom the estates were to pass over to others, were to have nothing to their own use. And since A refused, B must take in possession presently, because no other can have it. But, in case of the covenant to stand seised, the uses being executory and to arise out of the possession of the covenantor, if one refuse, or the use limited to him be void, yet this cannot carry the possession to the other sooner than was intended; because it is the consideration that draws out the use, and that by the terms of the covenantor himself begins not to operate as a consideration till after the death of A; and the consideration for each estate was several and independent. So, in the principal case; there, A covenanted by indenture with B and C that, in consideration they with the rents and profits should pay his debts, and such other sums of money as he by his will should appoint, he and his heirs should stand seised to the use of B and C for twenty-four years; and after the end or expiration of said term, then to the use of D his son in tail, &c. Then A is attainted of treason; and it was adjudged, *first*, that the limitation to B and C was void for want of consideration; because they were strangers to the payment of his debts, and were to pay them out of the rents and profits of the land limited to them, which was no consideration on their part, and therefore could raise no use to them, as it would if they had been made executors, or were to have paid the debts out of their own estates. *Secondly*, it was adjudged, that the limitation over, being after the end or expiration of the term of twenty-four years, and this term (which excludes the interest in the land) being void, the use shall arise to D in remainder presently. But, if it had been limited after the end or expiration of the twenty-four years, there, though the term had been void, yet the remainder should not have taken place till the twenty-four years run out by effluxion of time; because each estate was executory, and to arise out of the estate of the covenantor upon distinct considerations.

Ld. Paget's case, ubi sup. Mo. 195, *contra*; but *quære*—If the difference upon the word *term* was not in the book unobserved.

“If copyhold land be surrendered to the use of A for life, remainder to the use of B for life; if A commit a forfeiture, or refuse, B shall not enter till his death, but the lord shall enter, and hold during the life of A. So, in

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such case, of a surrender to the lord, B shall not enter till A's death, because his estate is by the custom, and is not to begin till after the death of A, and no incident of the common law which vests it sooner belongs to such estates without special custom; and then the lord, from whom all these copyholds originally moved, shall take advantage of such forfeiture, refusal, or surrender, as a benefit not originally departed with, when he gave out the lands. So, where A, B, and C, copyholders for life successively; A takes a conveyance from the lord of the freehold and inheritance; this does not divest the remainders to B and C. And yet they cannot enter till the death of A; because the custom was so, though the estate for life of A, as copyhold, was enfranchised and gone.

9 Co. 107; Margaret Podger's case, 1 Saund. 151; 2 Brownl. 154." ||Vide 3 Term R. 173.||

"If A limits an estate to the use of himself for life, remainder to his executors for twenty years, remainder to B in tail; A is attainted of treason, so that he can make no executors, by which the remainder to them is become void; the remainder to B shall take effect in possession presently, without staying until the years run out by effluxion of time. So, if the remainder had been to the administrators of A, which had been merely void for the time intervening after the death of A till administration granted; in such case, the remainder to B should vest in possession presently upon the attainder of A; because the intermediate remainder being void, the last remainder did then depend immediately upon the particular estate, and upon determination thereof takes effect in possession.

1 Leon. 196, 197; 2 Leon. 5; 3 Leon. 20; Moor, 100; Dyer, 309, Cranmer's case.

"Husband, seised of lands in right of his wife, makes a feoffment in fee to the use of himself and his wife for their lives, remainder to the use of C in tail, or in fee, and dies: the wife refuses the estate limited to her by the feoffment, and brings a *cui in vitâ*, not against the heir of her husband, but against C in the remainder; which proves, that upon such refusal the remainders, being by way of estate executed by feoffment, vested presently in C.

Plowd. 114; Amy Townsend's case, 1 Leon. 199.

"We come next to consider by what means remainders or reversions may be discontinued, barred, and destroyed, and by what not; and therein of the remedies for him in the reversion or remainder by entry, action, or rescuit. And here it will be necessary to distinguish between the acts of the tenant in possession solely, and the acts of the tenant in possession jointly, or with the concurrence of him in the remainder or the reversion; the acts of the tenant in possession solely, or such as are done or suffered either by the tenant for life or years, or by the tenant in tail. And of these, some only divest or displace the remainder or reversion, but make no bar or discontinuance; some both divest and displace the remainder or reversion, and also cause a bar or discontinuance; and some neither divest nor displace the remainder or reversion, and by consequence make no bar or discontinuance.

"As to the first—if tenant for life or years of lands, houses, or other things which lie in livery, make a lease for life, a gift in tail, or a feoffment in fee, levy a fine, or suffer a common recovery thereof; these acts divest and displace the remainder or reversion, but make no bar or discontinu-

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ance; for he in the remainder or reversion may enter presently for the forfeiture. But in case of the fine, if it be with proclamations, he in the remainder or reversion must enter within five years after the fine levied, else he is barred during the life of the tenant for life; but after his death, he has other five years to make his entry, within which if he does not enter or claim, he is then barred for ever; because his remainder or reversion being displaced and turned to a right, the operation of the stat. 4 Hen. 7 upon the fine bars such right, if no entry or claim be made within five years; and here being two several rights, one to enter presently for the forfeiture committed in levying the fine, and the other after the death of the tenant for life, when the title of him in remainder or reversion falls into possession, the words of the statute have been expounded to give five years for the respective recovery of these several rights. But, in case of the feoffment or common recovery, if there be no fine, he in remainder or reversion may enter at any time, either during the life of the tenant for life by reason of the forfeiture, or at any time after his death in right of his remainder or reversion.

Co. Lit. 252 a; Lit. sect. 611; Co. Lit. 327 b; Cro. Car. 157, 368; Plowd. 373 b; Cro. Eliz. 220; 1 Leon. 23, 214; 2 Inst. 519; Cro. Eliz. 254; Saunders v. Tucker, 7 Eliz.; Jones's case, Mo. pl. 192, 193; Co. 78; 2 Brownl. 157; MS. and 1 Keb. 249, 543; Fryer v. Kenn, 1 Chan. Cases, 279; 1 Leon. 40.

“Lessee for years of some lands, and of others at will, and of others by copy of court-roll, having also lands of inheritance in the same town, leases all to A for life; and then levies a fine to A of so many acres as included all the lands. Five years passed, he himself all the while continuing in possession, and paying the rent to the lessor. A dies; the lease for years expires: it was held by all the judges of England, except two, that the original lessor was not barred: 1st, Because without making such lease for life, the lessee for years, at will, or by copy of court-roll, could not have levied such fine to bar his lessor by the intent of the statute of 4 Hen. 7. 2dly. Though such lease was a disseisin and turned the reversion of the lessor to a right, yet being made by fraud and covin, that statute never intended to establish such fines. And it has now been adjudged, that if lessee for years makes a feoffment, and levies a fine, and five years pass, the lessor shall have the other five years after the term expired to enter or make his claim, as well as when lessee for life makes a feoffment, and levies a fine; for in that case he may have a writ of entry *in consimili casu* presently, as here he may have assize, and therefore this differs from the case put in Margaret Podger's case, that if lessee for years be ousted, and he in reversion disseised, and the disseisor levy a fine with proclamations, and five years pass, the lessor is for ever barred, because his right first began upon the disseisin, and disseisor comes in without the consent of the lessee for years; and therefore if he can defend his possession five years, he shall hold out the lessor for ever, who, by not pursuing his right within that time, hath let in the fine which works the bar by force of the statute; but in this case all is transacted by the means and with the privity of the lessee, who is trusted with the possession. And though in Farmer's case there were many notorious circumstances of fraud, yet it does not follow but that the law is the same where no such evidence of fraud appears. And it would be of dangerous consequence to men's inheritances if it should be otherwise. But, where tenant for life is disseised, and the disseisor levies a fine, there, the right of him in the remainder or reversion does not

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begin till the death of the lessee, as it does where the lessee for life himself levies a fine, or the lessee for years makes a feoffment and levies a fine; in which cases, if he in the reversion or remainder should be compellable to enter within the first five years, then, if the lessee for life or years should have charged or encumbered the land, they would hold it charged during the continuance of the particular estate in right. And the reason of the forfeiture in these cases being the breach of trust committed by the tenants in possession, it is reasonable he in reversion or remainder should have the same benefit where it is committed by a tenant for years, or where by a tenant for life in possession. *Quære*, if the law be the same on fine levied by copyholder for life or years; for if one ousts the copyholder, this is a disseisin to the lord, and both he and the copyholder on fine with proclamations, and five years, shall be barred for their several interests.

3 Co. 77, Farmer's case; Sir T. Raym. 219; 1 Vent. 241; 2 Vent. 334; 2 Lev. 52; 3 Keb. 37, 110, Whalley v. Tancred; Leon. 99.

"If tenant for life and a stranger levy a fine *come ceo*, &c., to him in the remainder for life, who accepts it, this is a forfeiture of both their estates; the one by giving, and the other by accepting, such fine, which passed a greater estate than both of them had; and therefore the remainder-man in fee may enter; because both are estopped by the fine. It was urged, indeed, that this was only the surrender of the first tenant for life, and could be no estoppel, because an interest passed; but the fine purports the contrary, in giving a fee, and therefore estops the parties to say against it.

2 Lev. 202; Sir T. Jo. 65; 3 Keb. 687, 733, Smith v. Abell.

"If there be A, lessee for life, remainder to B in tail, remainder to A in fee; B and A make a feoffment in fee to C, this divests the remainder to B and his own remainder likewise; but B may enter for the forfeiture, because his remainder hinders the closing of A's two estates, and then his estate for life, which was distinct, is, by the feoffment, forfeited and gone. But in this case, if A had made a lease to C, who afterwards makes a feoffment in fee to D, and then A had released all his right to B, this had been no forfeiture to entitle B to an entry; because A did nothing to take out the remainder from B, but the wrong and disseisin was done immediately to A himself, and his release passed only his own right without affecting B's remainder.

1 Roll. Abr. 854, pl. 5, 6; Hiblyn v. Slack, 857, pl. 3." *β* See Lyle v. Richards, 9 Serg. & R. 322; Lessee of Griffith v. Woodward, 1 Yeates, 316; Stump v. Findlay, 2 Rawle, 168.*g*

"If lessee for life makes a feoffment in fee, he in the remainder or reversion, be it for life, in tail, or in fee, may enter for the forfeiture; and if he in the first remainder does not enter, he in the second or third remainder may enter to the use of the others, and by reason of his own interest; and so may the issue or heirs of any of those in remainder after their deaths; for the feoffment divests their several remainders, and gives them title of entry in their turns.

1 Roll. Abr. 858, pl. 5—12, 15; 9 Co. 106; 2 Inst. 118.

"A, copyholder for life, remainder to B for life; A accepts a bargain and sale of the freehold from the lord to him and his heirs, and then levies a fine with proclamations with five years; then A dies. It was adjudged, that B may lawfully enter, for the acceptance only of the freehold from

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the lord did not divest the remainder to B, for A was only passive in it, and accepted that which it was lawful for him to take, and for the lord to grant; and then the remainder of B not being turned to a right, the fine could not attach upon it. And though, as between the lord and A, the copyhold was determined and enfranchised by the accession of the freehold; yet, as to B, it still continued copyhold, and then the fine levied of the freehold by A could not bind the copyhold of B, unless it had been turned to a right, any more than a fine levied of land shall be a bar to the rent issuing out of it; and B's remainder by the custom not being to take effect till after the death of A, he cannot enter sooner, nor take advantage of the forfeiture. But, if such fine had been levied after the death of A, and then five years had passed, this had barred the remainder of B, because then his title came in possession.

9 Co. 104, Margaret Podger's case; 2 Brownl. 134, 153; Mesme case, *per nosme* Bagnall v. Tucker. ¶ But where the remainder is *contingent* it is barred by the enfranchisement of the estate of the particular tenant. Vide 16 East, 406.¶

"A, tenant for life, remainder to B, remainder to C in fee: B being in possession levies a fine *come ceo*, &c., to a stranger; A dies. It was agreed by the whole court, that by that fine the remainder in fee is not touched, or discontinued: but because B had done as much as in him lay for the disposing of the fee-simple by the fine, and had taken that upon him, the same amounts to a forfeiture. *Quære* of this case, how B could be in possession unless by disseisin of A, and then that displaces all the remainders, and turns them to a right, which right, as to his remainder, being but for life, is forfeited by the fine, as it would be by a feoffment in such case, though the fine or feoffment cannot touch or displace the remainder in fee, that being divested and displaced before. But, if the fine were levied by B being in possession of a remainder, as a remainder only, then indeed it does not divest or displace the remainder in fee, and yet amounts to a forfeiture; as a fine levied by tenant for life of rent, common, &c., or other things, which lie in grant, would be. Wherein the fine differs from a grant by deed, though it be enrolled; for such deed of things which lie in grant neither displaces the remainder, nor amounts to a forfeiture of the particular estate. *Quære* the reason of the diversity.

1 Leon. 40, Braybrook's case; Co. Lit. 251 b.

"A right of a particular estate may be forfeited; and he who hath but a right of a remainder or reversion may take advantage thereof: as, if lessee for years be ousted, or lessee for life be disseised, and levy a fine to a disseisor, or a stranger; or, if the lessee for years bring an assize, or the lessee for life a writ of right, accept a fine *come ceo*, &c., of a stranger; these are forfeitures of their several rights, for which he who hath but a right of remainder or reversion may enter presently upon the disseisor.

Co. Lit. 252 a; Co. 2, 55; 1 Leon. 264.

"At the common law, if lands were given to one for life, remainder to another in fee, and a stranger brought a feigned action or *præcipe* against the tenant for life, who suffered judgment to go against him by default or confession, without praying in aid of him in the remainder, this divested the remainder, and turned it to a right. And yet he in the remainder had no remedy to recover it, unless he were once seised, as by entry upon the tenant for life before such recovery; in which case, after his death, he might maintain a writ of right against the recoveror upon such seisin. And whether any

formed on in remainder lay in such case, the books are not agreed. But if such feigned *præcipe* were brought against tenant for life, and he let judgment go by default, or confession, without praying in aid of him in the reversion, this was a forfeiture of his estate for life. And yet he in the reversion had no other remedy but by a writ of right. The reason seems to be, the credit which the law gave to such recoveries being had in courts of record; and because, for aught appeared to the contrary, the demandants might have good title to the land; and therefore the law would not suffer such recoveries to be impeached, but in an action of a higher nature, as the writ of right was. There were likewise other acts of record by the tenant for life or years, which amounted to a forfeiture of their estates; as, if tenant for life in a feigned *præcipe* brought against him pleaded in chief, vouched, or prayed in aid of a stranger, or in a writ of right. So, if in a writ of entry *in casu proviso* by a stranger, supposing the reversion to be in him, the tenant for life confess the action; or in waste against him by a stranger plead *null waste*; so, if lessee for years being ousted bring assize or lose in a *præcipe*, and bring error for error in the process; these and such like are agreed to be forfeitures of their estates. But, whether he in the reversion or remainder might enter, or were driven to his writ of right, or what other remedy he had, does not seem clear from the books: but the cases where the tenant for life lost in a feigned *præcipe* by default or reddition, that is confession, being the most frequent, and the prosecuting the writ of right by those in remainder or reversion being both tedious and expensive, the first statute that provided remedy in those cases was the statute of W. 2, c. 3, which gives power to him in the reversion to come in before judgment, and pray to be received to defend his right; or, if he did not come in, and judgment was given by default or reddition, then the statute gave him the writ of entry *ad communem legem* against such recoveror after the death of the tenant for life, wherein he might set forth his title; and if the tenant could show no better title than only the recovery, that should not avail him. So, where the recovery against the tenant for life was by *nihil dicit*, this being an equal mischief, was taken to be within the same statute. And so was he in the remainder as well as he in the reversion. But where the recovery was upon feint or feigned pleading of the tenant for life, this, not being within the statute, was remedied by 13 R. 2, c. 17, which gives resceit likewise in that case. But, to elude the force of this statute, the tenant for life would contrive to have the *præcipe* and recovery against him carried on so secretly, that he in the reversion or remainder should have no notice of it time enough to pray to be received, and then, if the recovery were against him upon feint or false pleading, this not being within the former statute of W. 2, or remedied by this of R. 2, otherwise than by giving resceit, which by such secret recovery was prevented, he in the reversion or remainder had no other remedy than what he had at common law before either of the statutes; therefore, to obviate this mischief, another statute was made, 32 H. 8, c. 31, which makes void all recoveries had by assent of the parties against tenant for term of life, unless it were by good title, or the assent of him in the remainder or reversion. But the tenants for life found a way to get out of this statute likewise, by making a feoffment in fee with warranty, and before he in the remainder or reversion could have notice to enter for the forfeiture, would cause a *præcipe* to be brought against the feoffee, and come in themselves by way of voucher; and so the recovery, not being

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against the tenant for life, as the statute speaks, was out of the statute, and remained at common law. So, if such tenant for life was not disseised, and a *præcipe* brought against the disseisor by covin, and he vouched the tenant for life, and so a recovery was had; this likewise was out of the statute; for which reasons this statute, being defective, was repealed, and another statute made, 14 Eliz. c. 8, which makes void all recoveries by agreement and covin had either against the tenant for life himself, or where he comes in by way of voucher only, unless he in the reversion or remainder assent of record, viz., upon voucher, aid prier, or rescuit. But if recovery be had against tenant for life without consent or covin, though without title, this divests the remainder or reversion, so that they cannot enter within any of the statutes, but remain yet at common law. And all these statutes extend to all sorts of tenants for life.

Co. Lit. 280, 281 a, 362; 2 Inst. 345; Co. 88; 10 Co. 44, 45; 2 Leon. 64; 4 Leon. 129; Booth, 151, 60, 70; Brook, tit. Forfeit, 8; 1 Co. 15, 39; Ed. 3, 16, 24; Ed. 3, 68, 5; Ass. 2, 22; Ass. 31; Co. Lit. 251, 252 a; 1 Bend. 132, pl. 194; Co. 15;" ||Vide 3 Taunt. 373: || "Co. Lit. 362 a; 1 Co. 15."

"A, tenant for life, remainder to B in tail, remainder to C in fee; A by indenture enrolled in Chancery, bargains and sells the lands to D and his heirs, and then D suffers a common recovery with voucher of A before the statute 14 Eliz., and execution was had thereupon. Yet it was adjudged a forfeiture, for which he in the remainder might enter presently without aid of any of the statutes; for a common recovery is but a common assurance or conveyance; and, if no use be declared, shall be to the use of tenant for life. And by the proceedings in it *constat curiæ*, that the recoveror hath no title. And the suing of execution, which is but in pursuance and contemplation of the first act, cannot be any bar to the entry of him in the remainder or reversion. Note: where tenant for life bargains and sells lands to A and his heirs, and after levies a fine *come ceo*, &c., to A; this was held a forfeiture of the bargainee, not of the bargainor, who at the time of the fine, which alone made the forfeiture, had nothing to forfeit.

1 Co. 14; Mo. pl. 423; 2 Leon. 60; 4 Leon. 123; Co. Lit. 362 a; 10 Co. 44, 45; 2 Co. 74; 5 Co. 40, Sir William Pelham's case; 1 Leon. 264;" #Stamp v. Findlay, 2 Rawle, 168.g

"A, tenant for life, remainder to B for life; B reciting that he had an estate in fee, levies a fine *come ceo*, &c., to a stranger, who brings *quid juris clamat* against A, and A makes default, and thereupon judgment was, that he should attorn, which he accordingly did. And the court held, that his estate for life was not forfeited, because the attornment was by compulsion of the court upon his default of appearance, and not voluntarily. And there two justices held, that the estate of B was not forfeited by the fine, because this made no discontinuance, and nothing passed by it but what he might lawfully grant. But two other justices held the contrary, that it is not the discontinuance only that makes the forfeiture, but where he doth any thing in a court of record whereby his will appears to disinherit him in the remainder or reversion; as, praying in aid of a stranger, &c. And this seems the better opinion. For attornment *in pais* to the grant of a stranger works no forfeiture; but attornment of record does, where in *quid juris clamat* the tenant for life comes in, and submits in court to attorn. But the attornment in the principal case being by judgment of the court upon the default makes the difference.

Cro. Eliz. 757, Hold v. Lister; Co. Lit. 252 a; 2 Leon. 64, 66; 4 Leon. 129, 132.

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"In *quid juris clamat* the tenant says, that he holds in tail of the gift of one A; the plaintiff says, that *A ne dona pas*: and upon issue it was found for the plaintiff. And Brown held that the plaintiff might enter presently, because by such claim the tenant for life had forfeited his estate; but whether the plaintiff should upon the verdict have judgment to recover the land, was the doubt.

1 Mo. pl. 108.

"In an assize of fresh force by A against B and C, it was found, that one D was seised of the lands in question, and by indenture made a lease for three years to B at such a rent; and after, by indenture enrolled, bargained and sold the reversion to the plaintiff A and his heirs, who after, for rent arrear, brought debt in C. B. against B, and he pleaded, that after the said lease, and before the grant to A, A* by deed enrolled according to the custom (a) bargained and sold to him, upon which they were at issue. And if this was a forfeiture of B's lease was the question, on which the jury doubted, and referred it to the court: and it was adjudged to be a forfeiture.

Walston Dixe's case, Moor, 211, pl. 352." ¶*D. (a) Of the city of London.¶

"It would be too large a field here to enter into all the cases and diversities wherein the particular tenant ought to pray in aid of or vouch him in the reversion or remainder, and where he in the reversion or remainder may pray to be received, and where not; and what acts of the particular tenant shall amount to a forfeiture, whereof and when he in the remainder or reversion shall take advantage, and in what manner, &c., these being large enough to make distinct heads of themselves.

"I shall proceed therefore to the second diversity, to show what acts of the tenant in possession make a discontinuance or bar of the remainder or reversion, and what not.

"If tenant in tail in possession of lands, houses, or other things, which lie in livery, make a feoffment in fee, a gift in tail, or a lease for another man's life, or levy a fine thereof; these acts divest and displace the remainder or reversion, and amount to a discontinuance; for avoiding whereof, after the death of the tenant in tail without issue, those in reversion or remainder are put to their formedon, and cannot enter; because then the alienee might lose the benefit of the warranty annexed to such alienation.

Co. Lit. 327 a; 3 Co. 85." ¶And vide Mr. Butler's note (2); Co. Lit. 327 a.¶ βSee also Lyle v. Richards, 9 Serg. & R. 322.g

"So, if a man seised of lands in tail, in fee, or for life, in right of his wife, made a feoffment in fee, a gift in tail, or a lease for another man's life; this divested the wife's estate, so that after her husband's death she could not enter, but was driven to her *cui in vitâ*; for the safeguard of the warranty that might be annexed to such alienation of the husband made a discontinuance of the wife's estate-tail, and of the reversion or remainders depending thereon, for avoiding whereof after her husband's death she was driven to her *cui in vitâ*, and after her death without issue, those in remainder or reversion to their several formedons.

Co. Lit. 326; 2 Inst. 342, 343, 681; 8 Co. 71.

"So, if in a *præcipe* brought against the husband and wife, of the wife's lands, the husband lost by default, reddition, or *nihil dicit*, if he were seised for life, or in tail, in her right, she was driven to her *cui in vitâ*, after his

death; but, if in fee, then she had no other remedy but a writ of right after his death. Which last case was remedied by the statute of W. 2, c. 3, which gives her a power to come in and pray to be received before judgment, or to bring her *cui in vita* after his death. But for an effectual remedy both for the wife and those in remainder or reversion against all alienations of the husband solely or jointly with his wife, except it were by fine or common recovery, wherein both joined, and as well of lands given to them jointly during the coverture as of lands whereof the wife was solely seised; and also for remedy against all recoveries by default, reddition, *nihil dicit*, or feint pleader of the husband, the statute of 32 H. 8, c. 28, gives the wife, and those in remainder or reversion, power to enter in their several turns; and so it does to their several issues or heirs, notwithstanding any fine, feoffment, or other act, made, done, or suffered by the husband only. And yet, if the husband and wife join in a feoffment of the wife's lands, this being in effect the feoffment of the husband only, is within the relief of the statute; so, if the lands were given to the husband and wife and their heirs during the coverture, all acts of the husband to defeat this estate are equally provided against by the equity of this act, as if the wife had the sole seizure thereof. But, if the husband levies a fine with proclamations of his wife's lands, and dies, the wife or her issue must enter within five years after his death, and those in remainder or reversion within five years after the death of the wife without issue, else they will be barred by another statute, viz., 4 H. 7, for such fine makes a discontinuance of the wife's estate, and of those in remainder or reversion at common law. And though 32 H. 8 aids the discontinuance by giving them an entry; yet it does not take away the bar which is wrought by their laches upon the other statute. Also the issue cannot enter during the husband's life, either by the common law or this statute."

β A deed of land executed by husband and wife, but containing no words of grant *by the wife*, does not convey her estate in the land, nor her right of dower.

Powell v. M. and B. Manufacturing Co., 3 Mason, 347; and see Rhodes' estate, 3 Rawle, 420; Weeks v. Hawes, 3 Watts & S. 520.*g*

"If tenant in tail in possession suffers a common recovery, this not only divests and displaces the estate-tail, and all remainders and reversions depending thereon, but also by reason of the supposed recompense bars them for ever; as is confirmed by every day's practice. But then he who suffers such recovery ought to be perfect tenant in tail, and also seised by force of the tail.

"For where husband and wife were seised of lands to them and the heirs of their two bodies, or to them and the heirs of the body of the husband with remainder over, and the stranger brought a *præcipe* against the husband only, who vouched over, and thereupon a common recovery was had; the wife died; and then the husband died without issue; it was adjudged, that this recovery should not bind the remainder; for between the husband and wife are no moieties, nor has the husband power to sever the jointure, or to dispose of any part of the land without his wife, so that the *præcipe* being brought against him only, the recompense cannot inure; because the wife had a joint estate with him at the time of the recovery, and did not join; and to a moiety it cannot inure, because here are no moieties between the husband and wife; and therefore the recompense, recovered by the husband only, cannot inure to the remainder, which depends upon

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a joint and undivided estate made to the husband and wife. And then the recovery, which binds only in regard of the recompense in value, cannot in this case bind either the issue, if there were any, or the remainder, since neither of them can take advantage, or sue execution of the recompense in value. And though the husband survived, this will not mend the case: because the law is to judge of it as it was at the time of the recovery, and not as it falls out by an after accident. But, if the estate had been to the husband and wife, and the heirs of the body of the husband, and he had levied a fine, or made a feoffment in fee, and then come in as vouchee in a common recovery, this had barred both the issue in tail and him in the remainder; because by the feoffment or fine, the whole estate was discontinued, and the feoffee or conusee sole and perfect tenant to the *præcipe*; and then, when the husband came in only as vouchee, he came in in privy and representation of all the estates he ever had, and was to make his defence by them, which if he does not, but calls upon another to defend him, and that other undertakes it accordingly, and by his misbehaviour suffers the demandant to get judgment, he is bound to make a recompense equal to what the other lost; and such recompense, being to be in lieu thereof, is to go in the same manner as the estate he was bound to defend should have done, and, by consequence, to the issue, and those in remainders or reversion; and then they having, in supposition of law, a recompense equivalent to what they lost, have the effect of the first supposed warranty, and cannot impeach the recovery, or complain of any hardship done them. But, if the husband and wife had been jointly seised to them and the heirs of their two bodies, with remainder over, and the husband had made such feoffment, or levied such fine, and then come in as a vouchee, it seems doubtful, if the issue in tail, or the remainder, should be barred; because the wife, having a joint estate of inheritance with the husband, was no party to the voucher, and therefore the recompense could not inure to the inheritance of the whole. And to a moiety it could not, because there are no moieties between them. *Quære ergo.*

3 Co. 6; Moor, 210; Owen v. Morgan, 3 Co. 6, Cuppledike's case.

“The tenant in tail at the time of the recovery, if the *præcipe* be brought against himself, ought to be then seised by force of the estate-tail in possession, (a) otherwise the recovery will be no bar either to his issue or those in remainder or reversion; because the recompense in value, which causes the bar, will go in lieu of the estate he then had, which was recovered, and not in lieu of the estate-tail which then he had not, nor, by consequence, could lose. Therefore, if tenant in tail be disseised, and the disseisor die seised, and his heir be in by descent, and then the tenant in tail enter upon the heir and disseise him, and, upon a *præcipe* brought against him, suffer a common recovery; or, if the tenant in tail take back an estate in tail, or in fee, from the disseisor himself; or discontinue the estate-tail, and enter upon the discontinuee, and then suffer such common recovery on a *præcipe* against himself; these recoveries bar neither the issue in tail nor remainders; because the recompense in value goes to the estate which he had at the time of suffering such recovery, which not being the estate-tail, cannot be a bar to the estate-tail, or the remainders or reversion depending thereon. But, if the *præcipe* had been brought against the discontinuee, disseisor, &c., and the tenant in tail had come in by way of voucher, and vouched over the common vouchee, and so a re-

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covery had been had, this would bar the estate-tail and remainders or reversions depending thereon: because he, coming in only as vouchee, comes in in privity and representation of the estate-tail, and for defence thereof, and cannot come in for any other respect; and therefore the recompense in value which he recovers against the common vouchee goes to that estate-tail, and the remainders or reversions depending thereon, and so makes good the recovery against the tenant, none having any loss but the last vouchee, and that occasioned by his own default or contempt.

Plow. 8, Mauzell's case; Co. 3, 5 b, 58; Mo. 256; 8 Co. 77, 78." ||(a) That the tenant in tail must be in possession, vide 1 Co. 76; Cro. Eliz. 827; 1 H. Bl. 269; 1 Barn. & C. 238.||

"Tenant in tail covenants to stand seised to the use of himself for life, and after, to other uses, which were totally void; because by such covenant only he could dispose of no more than for his own life; and after a *præcipe* being brought against him, and a common recovery had with single voucher; it was held, this recovery did not bar the remainder or reversion, because by such covenants *quoad* himself, the tenant in tail, was not seised by force of the tail, and then the recompense could not enure to the estate-tail and remainders. *Sed quære*, for Moore reports the same case otherwise, because, he says, he was tenant in tail as he was before notwithstanding such covenant.

Yelv. 51; Moor, pl. 940; Freshwater v. Ross, Moor, pl. 105; 2 Co. 52; Cro. Eliz. 279, 471, 895.

"Tenant in tail makes a lease for twenty-one years, and after makes a feoffment in fee with letter of attorney to enter and make livery; the attorney enters and ousts the lessee, and makes livery accordingly: and this was held a discontinuance of the estate-tail and remainders; for the lease being but for years, he was seised by force of the tail; and though livery by him or his attorney was a wrong to the termor by putting him out of possession, yet such livery gave away nothing from the termor, who may re-enter when he will, but passed only the freehold which the tenant in tail had or may give away by livery. But, if tenant for life be with remainders in tail, and he in the remainder in tail enter upon the lessee for life, and disseise him, and then make a feoffment in fee; or, if tenant in tail make a lease for life, and after disseise the lessee for life, and make a feoffment in fee, and the lessee die, and then the tenant in tail die without issue; he in the reversion or remainder may well enter, because the tenant in tail at the time of the feoffment was not seised of the freehold and inheritance of the estate-tail, but of another estate gained by disseisin. But, in the first case, if the tenant in tail after such lease for years had only granted the reversion in fee, and the lease had expired; though the grantee had entered in the life of the tenant in tail; yet this had made no discontinuance, because neither the lease for years, nor the grant of the reversion, divested any estate, but passed only what the grantor might lawfully grant, viz., an estate for his own life.

Mo. pl. 226." ||Vide Co. Lit. 332 b, note (1); || "Co. Lit. 347 a, b, 333; Sir T. Raym. 37; Co. Lit. 332 b. sect. 619.

"If tenant in tail make a lease for the life of the lessee, and after grant the reversion in fee, and the tenant for life attorn; or, if he by indenture enrolled bargain and sell the reversion, and then the tenant for life die, and the grantee enter in the life of the tenant in tail; this is a discontinuance equivalent to a feoffment, and puts the issue and those in remainder

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or reversion to their several formedons. And so it would be, if the tenant for life surrendered to the grantee, or the grantee recovered in waste, or entered for a forfeiture in the life of the tenant in tail; the grantor by the attornment and entry comes in in continuance of the new reversion, which was gained on making the lease for life. But, if the tenant in tail had died in the lifetime of the lessee, and then the lessee had died, and the grantee entered; yet the issue or those in remainder or reversion might well enter upon him; because there was no discontinuance executed in the life of the lessee longer than for the life of the lessee, and by his death, that being determined, the grantee, who *primâ facie* took only during the continuance thereof, has no right after the death of the tenant in tail to enter to enlarge the discontinuance. And though such grant of the reversion were with warranty, yet it would be all one; for the estate itself to which the warranty was annexed being determined, the warranty cannot have continuance or enlarge the estate. So, if after the death of the tenant in tail his issue had granted the reversion, though with warranty, and the tenant for life had attorned, and died, and then the grantees entered; yet the issue of that issue, or those in remainder or reversion, might well enter upon him; because the discontinuance was in effect but for life; and the issue who granted the reversion not seised by force of the estate-tail.

Co. Lit. 333, sect. 620, 621, 622, 339, sect. 638.

“If tenant in tail make a lease for life, remainder over in fee, and die in the life of the lessee for life; yet this is an absolute discontinuance, and takes away the entry of the issue or those in remainder or reversion: because the estate for life and remainders make but one estate, and all pass by the same livery. So, if tenant in tail make a lease for life, and after release to the lessee and his heirs, this is an absolute discontinuance, because the whole fee is executed in the life of the tenant in tail.

Co. Lit. 333 b.

“It is a rule in our books, that the estate-tail cannot be discontinued but where he who makes the alienation was once seised by force of the tail, unless it be by reason of a warranty: as, if the grandfather tenant in tail be disseised by the father, who makes a feoffment in fee, and dies, and then the grandfather dies, the son may enter upon the feoffee, and by consequence so may they in remainder or reversion in their turns. For here can be no discontinuance of the estate-tail or remainders; because the father who made the feoffment was not seised by force of the tail but of the estate gained by the disseisin. But, if the feoffment had been with warranty, this had wrought the effect of a discontinuance, and taken away the son's entry for preservation of the warranty, and to prevent circuitry of action. So, if tenant in tail be disseised, and he or his issue after his death release to the disseisor with warranty; this in effect amounts to a discontinuance, and takes away the entry of those who have right; which without the warranty, it would not have done; and the issue, being never seised by force of the tail without such warranty, could not by any means have discontinued the tail.

Co. Lit. 265 a, b, 333 b, 339 a, b, sect. 637, 601, 640, 641.

“Another rule is, that to make a discontinuance, the alienee must be in by force of the alienation of the tenant in tail himself, and not of any other. Therefore, if tenant in tail makes a lease for life, and after grants the reversion to A, and the lessee attorns; and then A grants this rever-

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sion to B, and the lessee attorns, and dies in the life of the tenant in tail; though B enters, yet this is no discontinuance, because B is not in of the grant of the tenant in tail, but of A his grantee. *Quære rationem.*

Co. Lit. 333 b.

“A, tenant in tail, remainder to B in tail, reversion to A in fee. A by indenture enrolled bargains and sells the lands to C and his heirs, and after levies a fine thereof to C and his heirs. C enfeoffs D, and then A dies without issue, and B enters. It was adjudged, that by the bargain and sale to C he had only an estate descendible to him and his heirs during the life of A, and also the reversion in fee expectant upon the estate-tail of B. *Secondly*, That the fine levied after made no discontinuance, not so much as a divesting or displacing of the remainder to B, but only inured to corroborate the estate of C, and by force of the statutes 4 H. 7, and 32 H. 8, made it to have continuance so long as A should have issue of his body: and that it operated only as a release or confirmation upon the estate, which passed before by the bargain and sale, and was guided by it. But, if the fine had been levied before the bargain and sale, or before the enrolment of it, this had made a discontinuance of the estate-tail and remainders. *Thirdly*, It was adjudged that the feoffment of the conusee made no discontinuance of the remainders to B, so as to take away his entry; for none can discontinue the reversion or remainders, but he only who hath the estate-tail; and therefore if tenant in tail grant *totum statum suum* to one who makes a feoffment in fee, this will not take away the entry of him in the reversion or remainder: and here, the remainder to B was not so much as divested or displaced, for the conusee had but a fee determinable upon the death of A without issue, and also the reversion in fee: and therefore when he who had a fee, though it were determinable, gave a fee, this did no wrong to the heirs of A, nor by consequence to B in remainder; as a feoffment by tenant for life or in tail does, who, having no fee themselves, cannot give a fee to others without plucking it out of the reversion or remainders; and therefore in one case it is a forfeiture of the estate for life, and in the other a discontinuance of the estate-tail and remainders. But here it is no wrong or discontinuance to either, and therefore the entry of B in remainder lawful.

10 Co. 95, Edward v. Seymours; 1 Bulstr. 62, *mesme case*, per nosme Heywood v. Smith.

“A, tenant in tail, remainder to B in tail: A makes a lease for three lives, warranted by 32 H. 8, and dies without issue: the warranty descends upon B who was his heir. It was held, that by the death of A without issue, the lease for three lives was determined and was no discontinuance, nor could bind him in the remainder; because the estate out of which it was derived was at an end, and then the lease to which the warranty was annexed being determined, the warranty was determined also, and cannot bar him in the remainders. And Vaughan says, that the case of *Salvin v. Clerk*, in which it is reported, that such lease is a discontinuance, and that therefore a subsequent fine with warranty by the tenant in tail, which on his death without issue descended to him in the remainder whose estate was discontinued, was a bar of the remainders; Vaughan says, that this case is all false and misreported; for the lease being warranted by 32 H. 8, was no discontinuance or tort; and then there was no new reversion gained to which the warranty could be annexed; but being

annexed to the estate-tail, determined with it, as did the lease, and so could not touch him in the remainder.

Cro. Eliz. 62, Koen v. Cope; 8 Co. 34; Co. Lit. 333 a; Vaugh. 383, accord. Cro. Car. 156; Salvin v. Clarke, Dyer, 48, 49, *contrâ*; but there, in the margin, is cited 1 Ed. 6, to be resolved by all the justices, that such lease shall not bind him in remainder. Hil. 40 Eliz. in C. B. Reeve v. Cox, adjudged accordingly, and 4 Mar. accord. *per cur*.

“ Another point in Salvin v. Clerk’s case was this: A, tenant in tail, remainder to B in fee. A makes a lease for three lives, warranted by 32 H. 8, and after levies a fine with proclamations, and dies without issue. Five years after his death elapse, and then the lease for three lives expires. B and his heirs are barred; because the right to have formodon in remainder, admitting such lease a discontinuance, or to enter, if it were not, accrued immediately on the death of A without issue; and he had no other right after the determination of the lease for three lives than he had before; for by the death of A without issue, that lease, or the right of his continuance, was at an end. And this differs from the case of a fine levied by tenant for life; for there, he in the remainder or reversion hath two titles, one to enter presently for the forfeiture, the other to enter within five years after the death of the tenant for life, when the remainder or reversion falls into possession; but here he hath but one title, viz., after the death of the tenant in tail without issue, and therefore ought to have pursued it by entry or action within five years after such death without issue.

Cro. Car. 156, Salvin v. Clerk.

“ A, tenant in tail, remainder to B in fee. A makes a lease for three lives, warranted by 32 H. 8, and dies without issue; and before any entry, B grants his remainder by fine. And if the conusee might enter and avoid the lease, was the question. Dyer and Mead held he might; because by the death of tenant in tail without issue, the lease was not avoidable only, but absolutely void, the estate out of which it was derived being determined; and the lease being warranted by the statute made no discontinuance; for if it had, then such grant of the remainder before avoidance of the lease had established and made it unavoidable.

Godb. 9, pl. 12.

“ Another rule is, that none can discontinue an estate-tail without he also discontinues the reversion or remainder; for the discontinuance working a wrong, and passing a larger estate than the person who makes it has by law power to pass, such estate must be made up out of the reversion or remainder. If therefore the reversion or remainder be in such person that the tenant in tail cannot draw it out, or if he who takes the estate has already the reversion or remainder, so that there is no occasion to draw it out for making good the estate given him by the tenant, there the alienation of the tenant in tail makes no discontinuance; because, for want of the reversion or remainder, he deals only with his own estate, and that being in tail, he can give no more thereof than for his own life only, and by consequence after his death his issue may well enter.

Co. Lit. 339, sect. 629.

“ Therefore, if there be tenant in tail, remainder or reversion to the king, and the tenant in tail make a feoffment in fee, a gift in tail, or a lease for life, this is no discontinuance; but after his death his issue may enter; for the remainder or reversion being in the king, the subject cannot by any act of his without title draw it forth, and then whatever estate he departs

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with must be wholly derived out of his own possession, which being in tail only, he can dispose no more thereof than for his own life only ; and by consequence after his death his issue may well enter. But, if such tenant in tail had suffered a common recovery, this in respect of the supposed recompense had barred the estate-tail, and all remainders depending thereon, except the remainders or reversions to the king, which by such feigned recovery and recompense could not be touched. So, if such tenant in tail had levied a fine with proclamations after 4 H. 7, this had bound the issue by virtue of that statute, but made no discontinuance either of the estates-tail or the reversion or remainder depending thereon ; because the reversion or remainder in the king prevented such discontinuance for the reasons before given : and then those in the intermediate reversion or remainder might enter after the death of the tenant in tail without issue, as if no such fine had been levied. But now by 34 H. 8, c. 20, it is provided, that where the king gives or otherwise provides lands to one in tail, no feigned recovery by assent of parties had against such tenant in tail of any lands, tenements, &c., whereof the reversion or remainder at the time of such recovery is in the crown, shall bind or conclude the heirs in tail ; but that after the death of such tenant in tail, the heirs in tail may enter, the said recovery or any other thing done or suffered by or against such tenant in tail to the contrary notwithstanding. Upon which last words this statute has been likewise extended to take off the force and effect of the fine levied by such tenant in tail of the gift or provision of the king, so as that the same shall not bind the issue ; though Hobart says, this was an oblique and indirect strain upon the statutes. For the statute 32 H. 8, c. 36, which says, that that statute shall not extend to fines levied by tenant in tail, the reversion being in the crown, but that they should be of like force as if the statute had not been made ; this did not at all mend the case of the issue in tail, and therefore that slip was helped by the judges upon the words of the following statute of 34 H. 8 ; upon construction of which statute it was also held, that all intermediate reversions or remainders to common persons depending on such estate-tail of the gift or provision of the king, whereof the reversion or remainder was then in the king, were preserved likewise against such feigned recovery by the tenant in tail in possession ; for their remainder or reversion being barrable at common law, in regard the estate-tail whereon they depended was barred, now that statute having made provision against barring such estate-tail in possession, by consequence, preserves also the remainders or reversions depending thereon.

Co. Lit. 372-b, 335 ; Dyer, 32 a ; Plow. 555 a ; Poph. 63 ; Brook, tit. *Assurance*, 6, tit. *Fines levy*, 121, tit. *Discontinuance of Possession*, 2, tit. *Recovery*, 31 b, tit. *Tail*, 41 ; Bendlow, 223 ; Plow. 254 ; Co. 878 ; Hob. 333 ; 2 Co. 19 ; Mo. pl. 259 ; Jackson v. Darcy, 3 Leon. 57, and 4 Leon. 40 mesme case ; Co. Lit. 372, 373. " Upon this stat. vide Co. Lit. 372 b, n. 3 ; Cruise on Rec. (2d edit.) 255 ; 5 Cru. Digest, c. 13, s. 9.]

" But this stat. 34 H. 8 extends only to estates-tail of the gift or provision of the king ; therefore, if a common person by deed enrolled gives lands to A in tail, remainder to B in tail, remainder to the king in fee ; or, if one who hath a remainder in fee, except upon an estate-tail of the gift of a common person by deed enrolled, grant such remainder or reversion to one for life, or in tail, remainder to the king in fee, and the tenant in tail in possession after suffers a common recovery ; this bars all but the remainders to the king, as it did at common law. So, if he levies a fine

with proclamations, this binds the issue as it did before; but, neither the king, nor those who have an intermediate reversion or remainder; because it makes no discontinuance, as has been shown.

2 Co. 15; Mo. 195, Wiseman's case; 2 Co. 52; Mo. 345 b, Sir Hugh Cholmley's case; Co. Lit. 372; Yelv. 149; Poole v. Needham, 2 Co. 41; 10 Co. 39; 1 Leon. 85; Cro. Car. 430.

"The king gave lands to one in tail, saving the reversion to himself: the donee is disseised, and the disseisor levies a fine with proclamations, and five years pass. Walmsley held, this bound only the issue, in whose time the fine and non-claim was, and that his issue were at liberty to enter after his death by the statute 34 H. 8. And though my Lord Coke cites this case to be resolved contrary, yet this is held in other books not to be law; for that would open an easy way to get out of the statute; and therefore, where such donee in tail, the reversion being in the king, bargained and sold the lands to one and his heirs, and died, and the vendee levied a fine, and five years passed without claim by the issue; yet the court seemed to be of opinion, that such issue was not bound; and if it were, that yet clearly his issue would be at large, and not bound by the fine.

Mo. pl. 665; Cro. Eliz. 595; Stratfield v. Dover, Co. Lit. 373, *contra*; 1 Sid. 166; 1 Keb. 620, Loyd v. Pollard.

"Other diversities there are upon the said statute, which being not to the present purpose, I shall pass over, referring you to the books where they may be seen.

Co. Lit. 372 b, and the books there cited.

"Another case wherein there can be no discontinuance of the estate-tail unless the reversion or remainder be also discontinued, is this: if tenant in tail enfeoffs him in the intermediate reversion or remainder, this is no discontinuance, but that after his death the issue in tail may well enter; because the livery being made to him who had the intermediate reversion or remainder, cannot be supposed to give him what he had already, or to draw out an estate from him only to give it him again *eo instanti*; therefore, such livery being made of the possession can pass only so much thereof as the tenant in possession had power to depart with; and that being for his own life only, leaves his issue at liberty to enter after his death. But, if A were tenant in tail, remainder to B in tail, remainder or reversion to C in fee, and A make a feoffment, gift in tail, or lease for life to C, this discontinues the estate-tail and the remainders depending thereon; because there is room for the tortious operation of the livery upon the first estates, before it comes to the last remainder or reversion in fee; and whether that be discontinued or not, yet the force of the livery, reaching beyond the estate-tail in possession, must be a discontinuance thereof, and of the next remainder depending thereon, since it can have no other effect.

Co. Lit. 335 a, sect. 629; 9 Ed. 4, 24; Plow. 559; 1 Co. 140.

"If tenant in tail make a lease for his own life, remainder to the donor in fee, this is no discontinuance; because the lease for his own life being lawful, the limitation over to the donor, who had the fee before, could make no discontinuance. For that would be to make the limitation to him by way of remainder work stronger than an immediate feoffment to them: and then he having, in the lease for his own life, given away all that he had, the limitation over is void. But if the lease had been for another man's life, with remainder to the donor in fee, this had been a discontinu-

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ance; because such lease, being more than he could lawfully make, plucked out of the reversion of the donor to serve and apply such lease; and then the limitation, which he afterwards makes to the donor, being derived out of such new fee gained by the first livery, carries on the discontinuance as against the issue in tail.

Dyer, 8, pl. 15.

“If tenant in tail enfeoff the donor and a stranger, this is a discontinuance of the whole land; because they take as joint-tenants, whereof each is seised *per my et per tout*.

Co. Lit. 335 a; Dyer, 12.

“Another way whereby those in reversion or remainder might at common law have remedy upon a recovery, with or without title had against tenant for life, in dower, or by the curtesy if such tenant, being impleaded, would not vouch or pray in aid of those in remainder or reversion, or they had no notice time enough to come in to pray to be received, was by bringing a writ of error to reverse the judgment given against such tenant for life, if there were error in it, not otherwise. But this they could not have till after the death of such tenant for life, unless they came in by way of voucher, aid prier, or rescuit, for then being parties to the record might have had such writ of error presently. And when the statute of W. 2 divided the fee conditional into a fee-tail whereon a reversion or remainder might depend, the judges extended the remedy which the common law gave by writ of error to those in remainder or reversion expectant on such estate-tail after the death of the tenant in tail without issue; but the judgment against the tenant for life divesting the reversion or remainder, so that he could not after grant or transfer it over to any person, and it being doubtful whether he could punish waste after such recovery had, therefore the statute of 9 R. 2, c. 3, gave him in the reversion or remainder expectant on such estate for life a writ of error or attain in the life of the tenant for life. And if the judgment be reversed, the tenant for life is to be restored to the possession and mesne profits, unless the plaintiff in error can prove that he was of covin, and assent that the demandant should recover; for then restitution is to be made of the possession and mesne profits to the plaintiff in error. And this proves that the parliament held such covin or recovery a forfeiture of the estate for life, otherwise it would have been hard to have given the possession and mesne profits to him in the remainder or reversion during the life of the tenant for life. But though it was a forfeiture, yet, as it appears before, if it were not erroneous, no sufficient remedy was provided for him in the reversion or remainder to take advantage thereof, till 32 H. 8, and 14 Eliz. And if it were erroneous, yet till this statute he could not reverse it till after the death of the tenant for life. But this statute making no mention of recoveries against tenant in tail, they remain still as they were after the making of the statute *de donis*; and those in reversion or remainder expectant thereon can have no writ of error of an erroneous judgment given against the tenant in tail, till after his death without issue; nor can they be received upon the statute of W. 2, c. 3, which gives the rescuit, because the estate-tail is looked upon as an inheritance which by possibility may endure for ever: and therefore during the continuance of it those in reversion or remainder are little regarded.

Co. 3, 374, F. R. 21 E. 99 d; Palm. 226, 229, 230, 245, 253, 254; 3 Co. 61; 2 Inst. 345; 10 Co. 44 a; 1 Co. 84; 1 Roll. R. 301, &c.

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"I shall put but one case to show what is a sufficient error for those in remainder or reversion expectant upon an estate-tail to take advantage of by writ of error, and how such writ of error may be barred or prevented by the tenant in tail.

"A having issue three daughters, B, C, and D, makes a feoffment to the use of himself for life, remainder to B in tail, remainder to himself in tail general, remainder to himself in fee; and dies. B enters, and takes a husband, and they both levy a fine with warranty against B and her heirs, B being then within age; and after a common recovery is suffered with voucher of B and her husband, who appeared by attorney, and vouched over the common vouchee; and so a common recovery is had, and the use declared to the husband and his heirs, B being still under age: then B dies without issue, and five years passed after her death; and now a writ of error was brought by C and D against one who claimed under the husband to reverse this recovery, and be let in by their formedon in remainder to avoid the discontinuance wrought by the fine for two parts of the land; and, after argument, it was held by all the court.

Palm. 224; Darcy v. Jackson, 1 Roll. R. 301, S. C. by the name of Holland v. See, 2 Roll. R. 85, S. C. *quoad* first part only.

"*First*, That the appearance of an infant by attorney was error, and as if the attorney had appeared without warrant; for an infant cannot give him authority *ad perdendum et lucrandum* for him as the warrant of attorney purports: but an infant might always appear by guardian assigned either by the court or by writ out of Chancery; and such guardian hath his warrant from the court, not from the infant, and ought to be one of an estate; for if he misbehaves himself, an action of descient lies against him. And though B here had a husband, yet he cannot make an attorney for his wife in a matter which concerns her inheritance, for then he might defeat her of her inheritance, especially in a common recovery, which is now but a common assurance, and their coming in as vouchees makes it the stronger, for the vouchee loses all the right to the land, and gives recompense to the tenant.

Palm. 225, 228, 244, 250, 251." *β* Bank of the United States v. Ritchie, 8 Peters, 128; Stoolfoos v. Jenkins, 12 Serg. & R. 403; Sliver v. Shelback, 1 Dallas, 165; Moore v. McEwen, 5 Serg. & R. 373.*g*

"*Secondly*, It was held by all but Haughton, J., that though by the fine the remainder was discontinued and put to a right, and the erroneous recovery was suffered after, yet those who had such right only at the time of the recovery shall have a writ of error to reverse it; for as by such recovery, if good, their right shall be bound by reason of the recompense; so, if erroneous, they shall have error to reverse it. And if it were otherwise, no common recovery would ever be reversed, for they always make a feoffment in fee, or levy a fine first, in order to have double voucher; and those in remainder or reversion have privity in right, though not in fact, by reason of the discontinuance; and as those who have but a right of a remainder or reversion shall take advantage of the forfeiture of a right of a particular estate, so shall those who have but a right of a remainder or reversion have error or attain upon erroneous recovery had against one who had but a right of an entail, 5 Ed. 3, 43, 6, 4. And by the voucher of the tenant in tail, he comes in in privity of the estate-tail, and revives the remainders to give them the recompense in value, without which they would not be barred. And though here the plaintiffs cannot be restored to the land by the reversal of the recovery, yet they

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will be restored to all they have lost by it, viz., their right to have formedon in remainder to avoid the discontinuance wrought by the fine. They agreed, if the remainder had not been *in esse* at the time of the recovery, but in abeyance only as to the right heirs of J S, there, though J S died after, yet his heir should not have error of a recovery suffered by tenant in tail: 7 Ja. Zouch v. Bamfield. So, of a remainder to the eldest son of A, who hath an estate for life; if A suffers an erroneous recovery, a son born after shall not reverse it; otherwise, when the remainder was *in esse* at the time of the recovery, as here, though turned to a right. But Haughton, J., held, that the plaintiff having only right of a remainder in fact, should not have a writ of error, unless their remainders had been turned to a right by disseisin of the tenant in tail, or such like tort; and that the privy of the remainders by the tenant in tail coming in as vouchee, was only restored to be barred and have recompense over, but not to be *de facto* restored to their estates.

Palm. 226, 229, 230, 245, 246, 253, 254, 216; 1 Co. 67, 7 Ja. Zouch v. Bamfield; Palm. 237, 251.

“*Thirdly*, It was held by all the court, that the infant appearing in this case by attorney was such an error as those in remainder may take advantage of, though strangers in blood; for this writ of error is not to reverse the recovery for the infancy of the feme covert, but because it was suffered by attorney without warrant, the infant having no power to make any warrant, and therefore it was not voidable only, but absolutely void; for the making of the warrant of attorney is an act of the party *in pais*, without examination of the justice, though the appearance by attorney after be recorded by the court. And upon showing this in a writ of error, the defendant must plead that she was of full age at the time of making the warrant, and the other must take issue upon it, and so it shall be tried *per pais*, not by inspection. And cases were cited, that those in remainder may have error for the infancy of the tenant in possession. But they agreed, that for avoiding a feoffment made by the infant there ought to be privy of blood, and that privy in estate was not sufficient; but here, by the voucher of the tenant in tail the remainders were so received for the sake of the recompense in value, that they were *quasi* parties to the record.

Palm. 226, 231, 207, 238, 246, 251, 254; 3 Co. 30 b, 43 Eliz. Hobby v. Daniel; 25 Eliz. B. R. Roll. 407, Carney's case; 8 Co. 43.

“*Fourthly*, It was held by all the court, that notwithstanding the objection that the warranty upon the fine could not bind this title to the writ of error upon the recovery, being matter subsequent and suffered after the warranty, that yet this warranty descending on the plaintiffs in remainder was collateral for two parts, and for these two parts barred them of their writ of error. For though the recovery was suffered after the warranty, yet their title to the remainders was prior to the warranty; and it is in virtue of that title they seek to reverse the recovery. And by the descent of the warranty their title to the remainder was divested and turned to a right. But, if the remainder be barred, so is their title to a writ of error to be restored to that remainder; for the remainder being barred, which is the principal, the writ of error, which is but accessory and depending thereon, is barred likewise. And a case was cited, 7 & 8 Ja., where father tenant for life, remainder to his son in fee, the father levied a fine with warranty to a stranger to the use of himself for life, remainder to his son for life, remainder over in fee, and died. It was resolved, that because the son had

not entered in the life of his father, but suffered the warranty to descend upon him, that now this had crushed his right to the remainder in fee, and he must be contented with the estate for life. And though in the principal case, upon the recovery against the conusee, he had judgment to recover in value against B, and therefore (as objected) the warranty was executed and satisfied by the recompense in value, and that no revoucher can be; yet it was held, first, that it does not appear that any actual recompense was had; secondly, the voucher upon the recovery was no execution of the warranty, because the recovery was part of the same assurance, and made in affirmance of it; and therefore the warranty upon the fine continues still unsatisfied; thirdly, admitting it were satisfied, so that he could not revouch, yet he may rebut by force of it; and here it is pleaded by way of rebutter. Also it was held, that though by this writ of error the land is not directly demanded, yet it is obliquely and by implication. And a return of all one's right in the land will be a bar of a writ of error, and the warranty here may be pleaded for avoiding circuitry of action.

Palm. 227, 231, 235, 238, 248, 252." β A collateral warranty of the ancestor, with sufficient real assets descending to the heirs, will bar the heirs from recovering the lands warranted, in Pennsylvania. *Eshelman v. Hoke*, 2 Yeates, 509; S. C., 4 Dall. 168.g

"*Fifthly*, It was held by all, that the fine with proclamations and five years' non-claim after the death of B without issue, had been a bar of this writ of error, if it had been relied on; but there, defendant after he had pleaded the fine with proclamations concludes *unde petit*, &c., if against the fine containing such warranty plaintiff ought to have a writ of error, and so hath relied upon the warranty, not upon the fine with proclamations; and he having election to rely either upon the one or the other, by relying upon the one hath waived the other, and therefore it shall be intended only a fine at common law without proclamations, which only discontinues, but does not bar any right. *Nota*. In this case it was after held by Doddridge, J., and Leigh, C. J., that for so much of the estate as was limited in use to the feme the warranty was extinguished and gone, and so plaintiff had judgment for all the point of the warranty, being the only point wherein the court was against him. And if the warranty were out of the way, he must have judgment for all. But *quære* here, for the use is to the husband and his heirs, and the warranty was against the feme and her heirs, and therefore this seems a mistake of putting the case.

Palm. 227, 232, 235, 240, 243, 247.

"As to such acts of the tenant in possession as work no divesting or displacing of the remainders or reversions, and by consequence no bar or discontinuance, this has already appeared in part, and I shall only put two or three cases more for further illustration thereof.

"If there be tenant for life, remainder to the king for life, remainder to another in fee, and the tenant for life make a feoffment in fee; this works no divesting or displacing of the remainder to the king, nor by consequence of the remainder depending thereon, but passeth only his own estate for life. And yet this amounts to a forfeiture whereof the king may take advantage; because, by making livery thereof in fee, he hath done as much as in him lay to defeat and disinherit the king of his remainders, which is always a sufficient cause for the forfeiture of a par-

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ticular estate. So, if the king make a lease for years, and the lessee make a feoffment in fee, this is a forfeiture of the term; and yet the reversion is not drawn out of the king.

1 Co. 76 b; Co. Lit. 251 a; Poph. 30.

"If tenant for life, the reversion or remainder to the king be pleaded in a *præcipe*, and a recovery be had against him by assent, without title, this does not divest the remainder or reversion of the king; because being by assent, and without title, it is but in the nature of a conveyance, which cannot take away the king's inheritance. But, if such recovery were upon good title and without covin, this would divest the king's remainders or reversion, because the judgment is matter of record, and no wrong is done to the king; as, if a disseisor recovers against the tenant for life, and enters, by this he defeats the king's remainder.

1 Co. 16; 2 Co. 53.

"If tenant for life of rent or services on a *præcipe* brought against him pleads to the right, or confesses the action, &c., or grants them in fee, this is no forfeiture to him in the remainder or reversion; because they cannot by any act of the particular tenant be drawn out of him in the remainder or reversion, or be conveyed for any longer time than such particular tenant hath interest therein. Wherein there is a diversity between land, houses, and other things which lie in livery, as appears before, and rents, commons, advowsons, remainders, or other things, which lie in grant only. For if tenant in tail of such things as lie in grant, by deed or fine grant them to one and his heirs, yet this is no discontinuance; but the issue in tail, or those in remainder or reversion, may distrain for the rent, use the common, present to the church, or enter into the land; or they may, if they will, admit themselves out of possession, and bring their formedon. But then, a lineal warranty with assets, or a collateral warranty without assets, will be a bar to them, and therefore it is more dangerous to bring such action.

15 Ed. 4, 9; Co. Lit. 251; 2 Leon. 61; 4 Leon. 126; Ca. 385; Co. Lit. 327, 332 a, sect. 608, 615, 616, 617; Poph. 63." ||Vide Co. Lit. 271 b, n. (1).|| *β* A conveyance in fee by a tenant by the curtesy is not a forfeiture of his estate. *M'Kee v. Pfout*, 3 Dall. 489. But a common recovery suffered by a tenant for life works a forfeiture of the particular estate. *Stump v. Finlay*, 2 Rawle, 168.*g*

"Another diversity is, between such things as lie in grant and are *in esse*, and such things as lie in grant and are newly created: as, if tenant in tail of land grant thereof a rent, common, &c., to one and his heirs, yet this is absolutely determined by the death of the tenant in tail upon the construction of the statute *de donis*.

3 Co. 85; Co. Lit. 377.

"If one let lands to A for life, and A let the same lands to B for years, and after grant the reversion, yet the grantee hath an estate but for term of life of the grantor, and there is no divesting of the first reversion, nor cause of forfeiture; because by such grant nothing passed but the estate which the grantor had. So, if A had in this case released or confirmed the land to B and his heirs, yet he would have only an estate for the life of A, and no forfeiture or divesting of the first reversion.

Co. Lit. 330, sect. 609, 610.

"I come now to consider the acts of the tenant in possession jointly, or with the concurrence of him in the remainders or reversion, whereof some

divest and displace the remainder or reversion, and cause a forfeiture and discontinuance, and some not.

“A, tenant for life, remainder to B in tail, remainder to C in tail, or in fee. A and B join in a fine *come ceo*, &c., to D in fee, who grants and renders a rent-charge to A for life: B dies without issue: then C enters; and A distrains and avows for the rent. It was adjudged lawful; for this fine made no discontinuance either of the first or second remainder, but each of them give only what he might lawfully give, viz., A his estate for life, and B a fee determinable upon his death without issue; and the remainder to C was not divested or discontinued by the fine; and by consequence no forfeiture of the estate for life was wrought, by reason he in the remainder in tail joined therein. And there it was held, that, if need were, to prevent a forfeiture, it should be construed first the grant of B of his remainder, and then the grant of A of his estate for life. It was likewise held in the same case, that if A and B had joined in a feoffment by deed, this would be no discontinuance or divesting of the remainders or reversion, but that each should be said to pass only what they might lawfully depart with: and that if B died without issue, yet the feoffee should hold during the life of A. But some books hold this case of the feoffment to be different from the fine, and though the fine makes no discontinuance, yet the feoffment, they think, does. And it was held in the principal case, that if the feoffment were by parol, it would operate as the surrender of A, and the feoffment only of B, which would discontinue the estate-tail and remainder. For in such case it cannot inure otherwise; because unless the remainder comes into possession by the accession of the estate for life, it would not pass at all; for a remainder, as such, cannot pass by parol without deed; and therefore to make B's joining of any effect, it must be taken to be the surrender of A, and the feoffment of B. But a case was there cited, 41 Ed. 3, 21 & 41 Ass. pl. 2, where A was tenant for life, remainder to B in tail, and A made a feoffment in fee to B and his wife, who survived B, this was held a forfeiture of A's estate for life, and that D in remainder might enter: because between baron and feme there are no moieties, and the wife surviving is in of the whole by A the feoffor, whose feoffment divested and displaced the remainder to D, and, by consequence, made a forfeiture of A's estate for life. So, where tenant for life, and he in the remainder for life, join in a feoffment, though by deed, yet this is a forfeiture of both their estates, for which he in the next remainder may enter presently; because both of them joined in the tortious act which divested the remainders.

1 Co. 76, Bredon's case; Hob. 227, 278; 6 Co. 15 a, Treport's case; Co. Lit. 302 b; 1 Roll. Abr. 855, pl. 7, 8.” ¶ And vide note (1), Co. Lit. 302 b; ¶ “Sid. 83, MS.; Co. Lit. 251 a, 302; Hob. 277; Dyer, 339 a; 1 Leon. 262; 1 Roll. Abr. 855, pl. 8.

“If A be tenant for life, remainder to B in tail, remainder to C in fee; A make a feoffment in fee to C; this divests and displaces the remainder of B, and is a forfeiture for which he may enter. So, if A were tenant for life, remainder to B in tail, remainder to C in tail, remainder to D in fee, and A make a feoffment in fee to B, who dies without issue, C may enter for the forfeiture; for the livery divested his remainder, and B could not dispense with the forfeiture as to his own estate. So, if A be tenant for life, remainder to B in tail, and B release to A in fee, and after A make a feoffment in fee, and then B die; yet his issue may enter for the forfeiture; for the release did not mend at all the estate of A;

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and though it prevented B himself from taking advantage of the forfeiture, yet it could not bind his issue, or those in remainder.

1 Co. 140; Poph. 84; 1 Roll. Abr. 857, pl. 1, 2, 4.

“ Husband, tenant for life, remainder to his wife for life, remainder to the heirs male of their two bodies, remainder to A in fee. The husband and wife levy a fine with warranty, and die without issue:—the warranty descends upon A: yet it was adjudged, that neither the fine nor the descent of the warranty upon A barred or discontinued his remainder, because the estates of the husband and wife for their several lives continued distinct, and were not merged in the remainder to them in tail; (a) and then not being seised by force of the tail, their fine could make no discontinuance of the estate-tail or the remainder, and by consequence the warranty could not attach upon A, whose estate was not divested or turned to a right. But in all these cases the fine with proclamations binds the issue by force of the stat. 4 H. 7, and 32 H. 8.

1 Leon. 36; 1 Sid. 83; Raym. 36; 1 Keb. 76, &c., *Stevens v. Brittridge*.” [(a) For where the estates of freehold are successive and not joint, they do not unite with the joint remainder of the inheritance. *Fearne, C. R. 35*, (7th edit.)]

“ A, tenant for life, and B in remainder in tail, levy a fine; B dies without issue, and if the conusee should hold during the life of A, was the question. The court thought this case the same with *Bredon's case*. But *Hale* said, the reasons given in *Bredon's case* make against the resolution; for where it is said, the remainder in tail passed first to avoid a forfeiture, he said, if it did, the freehold must then pass to it by way of surrender, and so drown; but they shall rather be construed to pass *insimul et uno flatu*: and he resembled the principal case to a feoffment by the husband and wife of the wife's lands whereof the husband is entitled to be tenant by the curtesy; the heir of the wife shall not avoid the feoffment during the life of the husband. But the case was ended by agreement.

“ Husband and wife, seised of lands to them and the heirs of the husband, make a lease thereof to the defendant, who covenants with them and each of them, and with the heirs and assigns of the husband, to do such a thing upon the land. The husband and wife convey the reversion to the plaintiff in fee, who brings covenant, and concludes *unde actio acerevit* to him as assignee of the husband, without averring the wife to be dead. And though it was urged, that he ought to have brought covenant as assignee to both, having his estate as well from the wife, who had an estate for life, as from the husband who had the fee, unless he had alleged the wife to be dead; yet it was held well, being brought by the assignee of him who had the inheritance, and so no prejudice to any; and that the estate for life being transferred with the fee was thereby drowned and confounded, and so the action well brought as assignee of the husband.

Cro. Car. 285, Major v. Talbot.

“ A, tenant for life, remainder to B in tail, remainder to C in fee. A and B intermarry, and after levy a fine *come ceo*, &c., with remainder to A for life, remainder to B the husband and his heirs; then the husband and wife suffer a common recovery with single voucher to the use of the husband and his heirs, and die without issue. C enters within five years. And it was adjudged clearly, first, That the fine levied by A and B made no discontinuance, and they would not suffer it to be argued for the reasons in *Bredon's case*; for none can discontinue an estate-tail but he who is seised thereof in possession, or at least of the freehold thereof. Secondly,

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It was adjudged, that the recovery was no bar or discontinuance of the estate-tail or remainders, because he who suffered it was not seised of the estate-tail at the time of the recovery; for by the fine an estate in fee determinable on B's death without issue passed, though there was no discontinuance; and by the render a new estate is given to the husband, to which the recompense in value upon the recovery inures, and not to the estate-tail, nor, by consequence, to the remainders depending thereon. And this recovery was not within 32 H. 8, because he in the remainder in tail joined with the tenant for life. But it was agreed, that the fine would have bound the issue, if there had been any, by virtue of the statutes.

Cro. Eliz. 827; Moor, pl. 870; Peck v. Channell; 1 H. Black. 269; 1 Barn. & C. 238. || β In a common recovery, the tenant to the *præcipe* must be tenant by a legal title, an equitable title is not sufficient. Stump v. Findlay, 2 Rawle, 168.*g*

"A, tenant for life, remainder to B for life, remainder to C in tail, remainder to B in fee. B levies a fine *come ceo*, &c., to D: this is a forfeiture of his remainder for life; so that after the death of A, C may enter; for by this fine B is estopped to say that he did not pass a fee in possession without any fraction of estate. And therefore this differs from Bredon's case, where the estate for life and remainders were immediate one to the other, which here they are not.

1 Roll. Abr. 855, pl. 9; Owen, 146; Styles, 192; Garret v. Blizard, 2 Mod. 114, *infra*.

"Feme tenant in tail general, remainder to the husband and his heirs during the life of A, remainder to A in fee. The husband and wife levy a fine *come ceo*, &c., to D and E, to the use of the wife and her heirs; the husband dies; the wife dies without issue; A brings formedon against the heir of the wife, upon pretence that the fine levied by her, being tenant in tail in possession, was a discontinuance, and that the estate in remainder of the husband for the life of A was merged and extinguished in the fee granted by the fine to D and E, so that upon the death of the wife without issue the remainder to A was to come into possession. But it was held that the estate-tail of the wife, and the remainder of the husband for the life of A, were conveyed as two distinct estates in being to the conusees, and that the estate for life was not extinguished or involved in the estate-tail given by the fine; for then it must be either by surrender, forfeiture, or confirmation. By surrender it cannot be, because it is subsequent to the estate-tail; by forfeiture it cannot be, because the tenant for life gave not the fee alone, but gave only so much thereof as he had, and joined with the tenant in tail, who had power to give a fee during the estate-tail without wrong to any. And if need were, as in Bredon's case, to avoid a discontinuance, they construed the remainders in tail to pass first; so here, to avoid a forfeiture, the estate for life may be said to pass first, though in the conusee they both made but one entire estate. And if the fine were reversed for the infancy of the wife, yet the conusee should hold the husband's remainder for the life of A. So, if the fine were upon condition, both estates on breach thereof should be restored in the same plight as at first. But admitting it should be taken as a discontinuance of the wife, being tenant in tail in possession, and as the confirmation of the husband in remainder, yet A can no more enter during the continuance of the estate than if the husband had not joined in the fine, but had kept his right, or had released it to the discontinuee. For in such case, every one must sue in their turn to avoid the discontinuance: first, the

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issue, then he in the first remainder, and after A. Though the issue will not, or there be no issue, or the issue be bound, and the husband cannot by reason of his release, yet it is all one to A, for his right does not begin till after the two foregoing estates ended. But in Bredon's case, if the tenant for life had surrendered to him in the remainder in tail, and then he had levied a fine, and died without issue, he in the next remainder should have had a formedon presently, though the tenant for life were living; because by the surrender the estate for life was absolutely determined; but by his joining, as he did there, or if he had released or confirmed the land to the conusee, in such case he should have been said to give only his own single estate for life, and he in the second remainder should not enter till that determined. And therefore in the principal case it was held, that no formedon lay during the life of A.

Hob. 277; 1 Roll. Abr. 854, Earl of Clanrickard's case.

"A, tenant for life, remainder to B in tail, remainder to A in fee. A and B make a lease for three lives by indenture to C; then A dies, and B grants the reversion to D in fee, to the use of his last will, and by his will devises the reversion for years, and dies leaving issue. The three lives die; the devisee for years enters, and the issue of B ousts him. And it was argued that this lease for three lives was a discontinuance, because, as it was said, it was more than they could both make, and so it was a tort; and the reversion gained by tort, though in whom the reversion was might be a doubt. But it was adjudged no discontinuance, and that the entry of the issue was lawful; for the lease being by indenture was the lease of A, and the confirmation of B; but if it had been without deed, then it had been the surrender of A, and the lease of B only, because otherwise nothing could pass from him, his remainder as such not being transferable but by deed.

Cro. Eliz. 56; 1 Leon. 243, Trevilian v. Lane.

"A, tenant for life, remainder to B in tail. A makes a feoffment to the use of himself for life, remainder to B, then A and B enfeoff D. Gaudy and Shute held clearly, that this was a discontinuance; for when B enters to make the feoffment, he is remitted by reason of the forfeiture committed before by A, and then by such a remitter he gains the possession, and it is only his feoffment, and so it is a discontinuance; for both cannot have the possession. Clench, *cont.* Because the intent of B's entry was only to join in the feoffment with A, and to pass both their estates together, and not to take advantage of the forfeiture; and therefore it was no discontinuance. But the case was adjourned, and no judgment appears to be given.

1 Leon. 127; Cro. Eliz. 135, Toft v. Tomkins.

"A, tenant for life, remainder to B in tail. A levies a fine to the use of himself; then he and B join in a feoffment by letter of attorney. And it was held a discontinuance, because it was the feoffment of B, and the confirmation of A only.

Dyer, 324, pl. 35.

"A, tenant for life, remainder to B in tail, remainder to C in tail, or fee; a *præcipe* is brought against A and B, who both vouch the common vouchee, and thereupon a common recovery is had; yet this shall not bind the estate-tail or remainders, because B in remainder is not tenant to the *præcipe*, but A the tenant for life only, and therefore the recompense

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in value cannot go to B in remainder only, he being never seised by force of the tail; but shall go to them jointly according to the writ, which was against them jointly, and supposed them joint-tenants; and by consequence can be no bar to the estate-tail or remainder, whereof they were not jointly seised, but in remainder one after another.

Dyer, 252; 3 Co. 6, Kniveton's case; Cro. Eliz. 670, Leach v. Cole.

"But in that case, if A only had been empleaded, and had vouched B in remainder in tail, and he the common voucher, and so a common recovery were had, this had barred the estate-tail, and all remainders or reversions depending thereon; because there A was sole tenant to the *præcipe*, and by voucher of him in the next remainder in tail he does his duty. And if he in the next remainder in tail cannot defend the possession, or call in one who will, he must be contented with the recompense in value which the court adjudges the last vouchee to render to him according to the estate he hath lost; and such recompense is to go over to those in the future remainders, whose estates are likewise by the judgment taken out of them to make good the estate recovered.

10 Co. 43; 3 Co. 60, Cro. Eliz. 562, 570; Mo. pl. 953, Jennings's case; 10 Co. 39 b; Co. Lit. 362 a.

"A, tenant in tail, and B in reversion in fee, join in a lease for life by deed, which is not warranted by 32 H. 8, then B devises his reversion, and dies, and after A dies without issue; and the question was, if this lease was a discontinuance of the estate-tail and reversion; for then the devise of B is void, he having no reversion, but only a right of a reversion, which is not devisable. And three justices held this lease a discontinuance, and, by consequence, the devise to be void; for the livery is made only by the tenant in tail, for he only hath the immediate freehold, and his lease discontinues the estate-tail and reversion, and gains him a new fee during the lease. And they held likewise, that it was a discontinuance presently or not at all; for the after accident of the death of the tenant in tail without issue, could not make it a discontinuance of the reversion, if it were not so upon making the livery. But Croke, J., held it no discontinuance, first, because it should be taken to be the lease of the tenant in tail during his life, and the confirmation of him in the reversion; and after the death of the tenant in tail, without issue, then it should be taken to be the lease of him in the reversion only. Secondly, because their joining in such lease shows they had no intent to make any discontinuance to divest or displace the reversion. But by the other three justices it was adjudged to be a discontinuance, and the devise void.

Cro. Car. 387, 405, Baker v. Hacking." || Co. Lit. 335 a, n. 2; and vide tit. *Discontinuance*.||

"A, lessee for years, remainder to B wife of C for life, remainder to D in tail, remainder to C husband of B for life, remainder to B in fee; the husband and wife, by fine *sur concessit*, grant *tenementa prædicta et totum et quicquid habent in tenementis prædictis* to E and his heirs for the life of the husband and wife, and the longer liver of them, with warranty against them, and the survivor of them: A attorns; afterwards F father of D, and the husband and wife, levy a fine *come ceo*, &c., with warranty severally against F and his heirs, which descended on D; and if the fine *sur concessit* by the husband and wife should inure to pass an estate in possession for their lives, and the life of the longer liver of them, then it was

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agreed by all that the remainder to D was displaced, and then the warranty attaching upon him bound him : but, if it had passed only their several estates by fraction, viz. : the estate of the wife in possession, and the estate of the husband as a remainder, then there was no such divesting of B's remainder as would let in the warranty upon him. But the better opinion seems, that by the grant of *tenementa prædicta* for the life of the husband and wife, and the longer liver of them, an estate in possession passeth for that time ; and that the words *totum et quicquid habent, &c.*, cannot be taken by way of restriction to qualify it, so as to pass only their several estates by fractions, that being a distinct independent clause, and added by way of accumulation to include and take in whatever intent the first words might be thought insufficient to carry ; and then the remainder to D was displaced, and the warranty of his father attaching upon him bound his right. For they all agreed, that the first fine, though executory only at first, was well executed by the attornment of the lessee for years ; and though the fine *sur concessit* be the most innocent of all others, and but as a grant of *totum statum suum*, if there be proper words of restriction, yet with such words it passes a fee as well as the fine *come ceo, &c.*, which, if levied by tenant for life or years, is always a forfeiture of their estate, be the restriction what it will. And here they ought to have only granted *totum statum suum et quicquid habent in tenementis prædictis*, without saying for what estate, or, if any estate were named, it ought to have been only for the joint lives of the husband and wife, or for the life of the wife, and after the death of D without issue, then for the life of the husband : but as it is here, it passes an entire estate in possession for a longer time than they had power to give it, and so displaces the remainder to D, and lets in the warranty. And yet it was agreed by all, that the intent of the husband and wife was only to pass their several estates, because otherwise D, by his entry for the forfeiture, might not only have defeated the estate of E the purchaser, but might also (being in possession) by a common recovery have barred the remainder in fee to the wife ; to prevent which, as they thought, they contrived such fine, E having agreed to the purchase of the whole estate, and D being only to join in the sale when he came of age. Note—Garret v. Blizard, (*suprà*,) was cited and relied on : but the parties after agreed, and no judgment was given.

2 Lev. 154 ; 2 Johns. 65 ; 2 Mod. 109 ; 3 Keb. 321, 580, 632, 681, &c., Piggott v. Ld. Salisbury.

“A, by lease and release on a marriage intended with B, conveys lands to the use of himself for ninety-nine years, if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to B for life for her jointure, remainder to the first, second, and other sons in tail-male successively, remainder to the heirs male of the body of A on the body of B to be begotten, remainder to the right heirs of B ; the marriage takes effect ; and before the birth of any son, A and B mortgage the said lands for five hundred years to the plaintiff for securing 1000*l.*, and then levy a fine *come ceo, &c.*, to the plaintiff, in the first place for corroborating the term, and after to the use of the right heirs of A ; the trustees enter for a forfeiture ; then a son is born, after A dies, and the trustees continue possession in right of the son ; the plaintiffs enter, and B is yet living. And if the plaintiffs should hold during the life of B, was the question ; for there was no endeavour to prove the contingent remainders destroyed, there being a sufficient estate in the trustees to pre-

serve them till they came *in esse*. For the plaintiffs it was argued, that they should hold during the life of B; for if the remainder in fee had been in a stranger, and A and B and that stranger had levied such fine, this had been a forfeiture of A's estate, by reason of the intermediate remainder to the trustees, who did not join: but it could be no forfeiture of B's estate for life, because he in the remainder joined; and therefore they only passed what they lawfully might pass, viz., their several estates. (1 Co. 76; 6 Co. 15.) And though both are conjoined in the conusees, yet there being no forfeiture, surrender, or extinguishment of B's estate for life, the estate of the conusee shall open to let in the contingent remainders when they happen, as if no alienation had been made, there being a sufficient estate to support them. And if there was no forfeiture of the estate for life of B upon levying the fine, the birth of the sons after cannot make it so, that being matter *ex post facto*; and 1 Co. 76, English's case was cited, where tenant for life and an infant in remainder joined in a fine, which was after reversed for the infancy; yet the conusee held during the life of the tenant for life. *Secondly*, Admitting the estate for life of B could not revive and separate from the inheritance to let in the contingent remainders when they happen, being conjoined in the conusee, yet, after the death of B, they may take place without any such interposition: as, if A be tenant for life, the remainder to B in fee, and A be disseised, and release to the disseisor, he shall have the whole fee during the life of A, and B cannot defeat it or take out his remainder till A's death. So, if A be tenant for life, remainder to his first and other sons in tail, and before the birth of any son A be disseised, and then after a son be born, and A release to the disseisor, he, by this, shall have a fee till A's death, and then the son may defeat it by entry; because the right of A supported it till it came *in esse*, and then his release after cannot destroy it. So here, the estate for life of B is virtually *in esse*, though being conjoined with the remainder in fee in the conusee it should not survive. But in this case the remainder in fee being in the wife, she has no estate for life to forfeit or surrender, but has the whole fee in her, subject to divide and let in the contingent remainders when they happen, and she has then no new estate but the same she had before, then joined, now divided, and therefore the conusee shall hold during her life. On the other side it was argued for the defendant, that, till the contingent remainders came *in esse*, the wife had the whole fee executed in her, and no estate for life; for that was not to arise till the birth of the sons; and therefore, by her joining in the fine, could not be granted or transferred over as any certain or fixed interest, but, being in contingency, was extinguished and destroyed by the fine before it took effect; and therefore the estate of the son shall be now in possession discharge of it. And a case was cited to be resolved in Chancery by the Chancellor, Hales, C. J., Wyld, Ellis, and Wyndham, February 1672, where A conveyed lands to the use of himself for life, and after his death and the death of B then to the use of C, this limitation to the use of C was resolved to be contingent, by reason that B had no estate, and he might survive. And there it was agreed, that if C had levied a fine or made a feoffment, the estate to C could never vest. But this case differs from Bredon and Treport's cases; for in those cases there was an estate for life *in esse*; but here there was none, but in contingency. But the principal case was adjourned, and no judgment appears to be given.

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In the case of *Smith*, on the demise of *Dormer v. Packhurst et al.*, (commonly called by the name of *Dormer and Fortescue*,) there was a limitation in remainder (after several preceding estates for life and in tail) to the use of A for *ninety-nine years, if he should so long live*, and from and after the death of A, or other sooner determination of the estate limited to him for *ninety-nine years*, to the use of trustees and their heirs, during the life of the said A, upon trust to preserve contingent estates, &c., and for that purpose to make entries and bring actions, &c., but to permit the said A to receive the rents and profits, &c., during the term of his life; and after the end or other sooner determination of the said term, to the use of the first and other sons of A successively in tail-male, with divers remainders over. By the expiration of all the preceding estates, A came into possession of the estate limited to him for ninety-nine years; and, having a son, he, together with that son, when he came of age, levied a fine of the lands to make a tenant to the *præcipe*, and suffered a recovery of the same, in which the son was vouched. The son died without issue, and afterwards A died without leaving any other son; the next surviving remainder-man made his actual entry within five years, and the question was, Whether the recovery had barred his remainder? This point depended entirely on another question, Whether the freehold was in the trustees during the life of A or not? For if it was, the recovery was not well suffered for want of a good tenant to the *præcipe*, and consequently did not bar the remainder; but if the trustees had not the freehold, then it was in the son, and of course he was capable of making a good tenant to the *præcipe*, and the recovery in that case was well suffered; for the court held, that the fine by lessee for years, (A,) or the reversioner, (the son,) could only operate by way of estoppel, to bar the parties claiming under such lessee or reversioner; but did not acquire the freehold, as a feoffment would have done.—To prove that the freehold was not in the trustees, it was insisted, *First*, That the remainder to the trustees was void in its creation, because to commence after A's death, and then hold during his life, which was repugnant, and could never take effect at all. *Secondly*, If not void in its creation, it was a contingent remainder, because it was uncertain whether it ever would take effect, as the term of ninety-nine years might not determine in A's lifetime. *Thirdly*, That if it was neither void nor contingent, yet it did not amount to a legal estate, but was only a right of entry.—But the court resolved, that the remainder was not void in its creation, its commencement not being restrained to the death of A, but limited from the death of A, or other sooner determination of the estate for *ninety-nine years*, and therefore might take effect by surrender, forfeiture, or effluxion of time, in A's lifetime. *Secondly*, That it was not a contingent remainder, being limited to persons *in esse*, without any condition precedent to be performed; it did not depend on the death of A, but on such other events (*viz.*: forfeiture, surrender, &c.,) as might determine the particular estate from the nature of the estate itself. *Thirdly*, That it was not a mere right of entry, but a legal estate; for a grantor cannot reserve a right of entry to a stranger, nor can a right of entry subsist without an estate. Therefore the trustees had the freehold for the life of A. And, upon the whole, the court held, that the fine and recovery did not bar the remainder.

Smith ex dem. Dormer v. Packhurst, 3 Atk. 135; 4 Br. P. C. 353, and 405; 18 Vin.

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Abr. 413; Fearn's C. R. 220, (7th edit.) Ibid. 8, *notis*, 570; 2 Str. 1105; Andr. 315, S. C.; || 6 Bro. P. Ca. 357, S. C.; and see Doe v. Martin, 4 Term R. 39.||

|| A was seised in fee, and devised to B his son-for life, remainder to the heirs of his body in tail, remainder to his own three daughters, and their heirs. On the death of A, B entered, and became seised of all A's lands; and, by deed between himself and his mother, assigned to her the possession of one third part of all the premises, to hold to her and her assigns for life, as if she had been in possession of the same by virtue of a writ of dower, and appointed C and D attorneys, to enter and give livery and seizin of one full third part: and the endorsement of the deed stated, that C and D delivered seizin of all the premises to the mother, to hold according to the uses and intentions of the deed. B's mother having become seised of an undivided third part of all the lands during her life, B levied a fine *sur conuzance de droit come ceo*, with proclamations, of the whole of the premises, and suffered a recovery, and died leaving no issue, but having devised away all the lands of A to a stranger. It was held, that the deed between B and his mother, and the livery made thereon, was a good assignment of dower to her; and therefore the fine and recovery suffered by B, and nonclaim within five years after the death of B, did not bar the remainder in fee to the daughters of A, in that one third part which B's mother had in dowry at the time of such fine and recovery.

Rowe v. Power, 2 New R. 1. See 3 Maule & S. 271; 1 Barn. & A. 85.||

"A, tenant for life of certain lands, remainder to his son B in tail. A and B join in a lease by indenture to C for life, remainder to D for life, rendering 10*l.* per annum rent. A dies; B accepts the rent from C, and dies, having issue, who also accepts the rent from C, and then enters, and makes a feoffment, and levies a fine to J S; then C re-enters and dies, and D enters as in his remainder. And the question was, If J S, the purchaser of the remainder, might avoid this lease in remainder to D; or if the acceptance of the rent from C, the first tenant for life, had made good the remainder to D, so that he coming in under the issue of B, who so accepted the remainder, should be bound by it? And it was adjudged, that the lease in remainder to D was good, and not avoidable by J S, the purchaser; for the power to avoid this lease was only given to the issue in tail in respect of his estate-tail, and when that by the fine is bound and gone, the purchaser, who is a stranger to the estate-tail, and not in privity thereof, cannot have the privileges annexed thereto, nor, by consequence, can avoid the lease, which the issue in tail as such only had power to do.

Cro. Eliz. 253; 1 Leon. 243, Jeffery v. Coite.

"Copyhold was granted to one for life, remainder to an infant in fee; they both join in a surrender to one who was admitted tenant for life, and after the infant dies, and his heir enters. It was adjudged, that he might well enter without being put to his writ of *dum fuit infra ætatem*; for such surrender was but a conveyance by matter *in pais*, which cannot bind an infant, but that he or his heirs may enter, or bring trespass before admittance.

Cro. Eliz. 90, Knight v. Fortipan.

"A tenant for life of certain lands, remainder to be in tail-male, remainder to A in tail, remainder to B in tail general, remainder to A in fee. A and B join in a deed, whereby A grants, and B confirms to C and his heirs, a rent-charge of 10*l.* per annum out of the said lands, B being then within

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age; then A and B levy a fine of the same lands to the use of A and his heirs, who enfeoffs the plaintiff, and dies, and B hath issue yet living. And if the plaintiff was chargeable with this rent, was the question. It was argued, that if a rent be granted by tenant for life, and confirmed by him in the remainder in fee, being within age, that this issues out of the estate for life only, and is merely a void grant as to the remainder; so that if the tenant for life purchases the reversion or remainder, and dies, this shall not bind the inheritance. And though he had made a feoffment over, yet a feoffee after his death should avoid it. But here, because A was not only tenant for life, but had also a remainder in tail, and after that a remainder in fee, the rent is issuing out of all his estates; and though it were void as against B, who was the next in remainder in tail, and confirmed it, by reason of his infancy, yet now that estate-tail of B being bound by the fine, and the whole estate limited to the use of A and his heirs, the court inclined that the rent had still a continuance, and should bind the plaintiff; for the privilege which the tenant in tail could have had, of avoiding the rent by reason of his infancy, shall not help the plaintiff, who comes in under all the estates of A, which of themselves would have been sufficient to go through the whole grant of the remainder, were it not for the remainder in tail to B, and that remainder is now by the fine barred and gone.

Cro. Car. 103, Holt v. Samback.

“A case in effect was this: A, tenant for life, remainder to B in tail, reversion to A in fee. A grants a rent out of the lands, to begin after his death; then he and B join in a fine to the use of A for life, remainder to B in tail, or in fee; then A dies; yet the rent shall not charge the remainder of B, for each passed their several estates only, viz., A his estate for life, and reversion in fee, and B his remainder in tail; and there was no estoppel, because a several interest passed from each of them; and then the remainder of B is no more chargeable with this rent after the fine than it was before, he granting only his own remainder distinct from what A granted; and by consequence, none of the charges of A can affect such remainder after the fine any more than they would have done before. But *quære*, upon B's death without issue, if the rent shall not then take effect, being well chargeable at first upon the reversion of A?

Mod. pl. 274.”

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“I AM now to consider in what cases the remainder or reversion shall be subject to the acts or charges of the particular tenant, and in what not, (which has been partly treated of before,) and when, and how, the charges of him in the remainder or reversion shall take place.”

‘A, tenant in tail, remainder to B in tail; B grants a rent-charge, A suffers a common recovery, and dies without issue; the grantee of the rent-charge distrains the alienee of A, and the distress was held unlawful: *First*, Because the alienee comes in under the tenant in tail in possession, whose estate was not subject to the charges of him in the remainder; for, if the tenant in tail in possession had made only a feoffment in fee, or a lease for years first, and then after a feoffment in fee, and died without issue, yet, till the feoffment avoided, the leases or charges of him in the remainder should not take place either against the lessee or feoffee of the tenant in

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tail. *Secondly*, The reason that these leases or charges out of such remainder are good, is for the possibility of the remainder coming into possession; for of itself it is a thing not manurable or visible, and consequently not liable to any distress; and therefore, if it be destroyed before it comes into possession, the charges granted thereout must fall too, as the shadow falls with the substance. *Thirdly*, Another reason is, that he who claims only out of such remainder after an estate-tail, cannot falsify the recovery had against the tenant in tail, for the recovery bars the remainder itself; so that he cannot falsify or any way plead to defend his remainder, unless he were vouched, nor, by consequence, can those who derive their interest under him.

Co. 62; Poph. 6; Moor, 154; 2 Co. 52; 6 Co. 42; Plow. 350.

“But where A was tenant for life, remainder to B in tail, and B granted a rent-charge, or made a lease for years, to begin after the death of the tenant for life, and A the tenant for life after suffered a common recovery, though with voucher of B in the remainder in tail, yet the lease or rent shall take place according as they were made or granted; for there such a lessee or grantee may falsify the recovery either by the common law or statutes; for the tenant for life hath no power to bar the remainder, without the assent or concurrence of him in the remainder, as the tenant in tail in possession hath; and his assent or concurrence cannot operate to defeat his own acts, any more than a recovery against tenant in tail in possession can defeat his own leases or grants; because in both cases the recoveror comes in by the tenant in tail, whether in possession or remainder, who alone has power over the estate, and shall be bound by his own acts.

Cro. Eliz. 718, Pledgard v. Lake; 1 Co. 62; Poph. 6.

If A be tenant for life, remainder to his first and other sons in tail-male, remainder to B in fee, and A before the birth of any son make a lease for years, grant a rent-charge, acknowledge a statute, &c., and afterwards surrender to him in the remainder, or make a feoffment, or commit other forfeiture, for which he in the remainder enters, yet he shall hold the estate subject to the charges of the tenant for life; for these being his own acts to determine his estate shall not turn to the prejudice of the lessee or grantee, who is a stranger; but his estate for life shall to this purpose be still said to have continuance, though as to all other purposes it is determined; and therefore the contingent remainders not being to arise out of the estate for life, but depending thereon till they come *in esse*, are, by the determination thereof before they come *in esse*, destroyed and gone.

Co. 67; Co. Lit. 338; 7 Co. 65; 8 Co. 145; 9 Co. 107; Ld. Raym. 521.

‘So, where lessee for years of an advowson granted the next avoidance, and after surrendered the term to the lessor, yet this shall not defeat the grantee of the next avoidance; because the surrender was his own act, before which there was a good grant, and that shall bind him in the remainder, who to this purpose comes in under the estate of the grantor.

8 Co. 145, Davenport’s case.

‘So, where two joint-tenants for life were, and judgment in debt was given against one of them, and then he released to the other joint-tenant, who died, and he in the reversion entered; yet it was adjudged, that he should hold a moiety subject to the judgment, during the life of the joint-tenant who released; for, as to this purpose, the estate for life in a moiety hath still continuance, though to all other purposes the lessor was in of his

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ancient reversion for the whole, and the joint-tenant, to whom the release was made, was in by the first lessor, and not by him who made the release.

6 Co. 79, *Ld. Abergaveny's case*.

‘One seised of lands in fee grants thereout a rent-charge to A for life, and after makes a lease to A for 500 years of the same lands; then A surrenders his lease to the lessor, who accepts it; and after A distrains, and avows for the rent. It was held that he might; because by the lease for years the rent was only suspended, and now by the surrender of that lease the suspension is taken off, and, by consequence, the rent revived; as, if the lease for years had been made upon condition only, by breach of the condition the lease being determined, the rent would revive; though as to any stranger, who might have prejudice by such surrender, the lease for years shall still be said to have continuance.

Cro. Car. 101; *Hutt.* 91, *Sir Edward Pete v. Pemberton*.

‘Tenant for life of a copyhold, remainder in fee; he in remainder makes a lease by parol (which, as it seems, must be warranted by custom;) then the tenant for life and he in the remainder join in a surrender to the use of him in the remainder in fee, and the question was, If this was a good lease, and should take effect in the life of the tenant for life? And it was held that it should; for it was a good lease against him in the remainder; and by the surrender of the tenant for life, to the use of him in the remainder, his estate is merged in the fee, and cannot hinder the lease from taking effect, more than if he were dead; and the whole being in his hands can have no privilege severed from the inheritance; as if he in the remainder grant a rent-charge, and after the tenant for life surrender, the rent shall begin presently.

Cro. Eliz. 160, *Dove v. Williot*; and vide *Co. Lit.* 338; *Cro. Eliz.* 547. || See 16 *East*, 406.||

‘So, where one made a lease for years, and after granted the reversion to another for years, to begin after the end or expiration of the first term, and then, during the continuance of the first term, made a lease for life to the first lessee, whereupon the grantee for years of the reversion brought an ejectment, it was held maintainable; because the first lease for years being, by the taking such lease for life, surrendered and gone, by the act and concurrence of the lessee and lessor, his grant of the reversion comes next to take place.

Plow. 198, *Wrotsley's case*.

‘If a woman inheritrix takes husband, and they have issue a son, and the husband dies, and she takes a second husband who lets the lands to one for life, and then the tenant for life surrenders his estate to the second husband, the son may enter upon the second husband during the life of the tenant for life; because as to the son the estate for life is drowned, and, by consequence, the inheritance, which the husband gained wrongfully by making such lease, is now by the surrender thereof vanished and gone; and then the rightful inheritance falls upon the son, and he may enter as if no such lease had been made, that which hindered his entry being taken out of the way. But, if a reversion be granted with warranty, and the tenant for life surrender his estate for life to the grantee, yet shall not the grantee have execution in value upon the warranty against the grantor, during the life of the tenant for life. So, if the tenant for life surrender to him in the remainder, or reversion, within age, yet he shall not have

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his age, because in these cases such surrenders would work a prejudice to a third person, which the law will not allow; though when it is for the benefit of a third person, he shall take advantage thereof,' "as by the cases before mentioned appears."

Lit. sect. 636; Co. Lit. 338.'

A, seised of lands in fee, makes a feoffment to the use of himself and the heirs male of his body; remainder in tail to several others, remainder to his own right heirs; *proviso*, that if there shall be a failure of issue male of his body, and that B be dead, and C be married, or of the age of twenty-one years, then she shall have 200*l. per annum* for ten years; then A dies, leaving D his son, who makes a lease for one thousand years, then levies a fine and suffers a recovery, and afterwards dies without issue male; and the contingencies all happened; and the questions were, *first*, If this rent was barred by the recovery? *secondly*, If the lease for one thousand years was chargeable with it? And it was *adjudged per tot. cur.* that this recovery that barred all the remainders *did also bar this rent*, which was to arise out of them; for though it were to arise precedent to the remainders, yet it was subsequent to the estate-tail of him who suffered the recovery; and therefore being chargeable upon and to arise only out of these remainders, and they being barred by the recovery, so was this rent also, which was to arise thereout; and for the very same reasons which are given in Capell's case, which it was said was the same case with this. *Secondly*, it was adjudged that this rent could not be chargeable upon the lease for one thousand years; because that was derived out of the estate-tail, which was precedent to and paramount the commencement of the rent: and the lessee was in after the remainders barred by the recovery, in continuance of the first estate-tail; which lease being before the recovery, the recoveror took the estate subject thereto. And they agreed, that if a gift in tail be made, rendering rent, or upon condition of re-entry, that no recovery by the tenant in tail will bar the rent or the condition, they being coeval with the very estate-tail itself; and therefore the recoveror, who comes in, in continuance of the estate-tail, takes it subject to such rent or condition; and yet, in this case of the rent, the reversion is barred, though the rent continues as a rent-service distrainable for at common law; but the condition they say must be a condition annexed to the rent and not a collateral condition, for that will be barred with the reversion by a common recovery.

Mod. 108; Sir T. Raym. 236; 2 Lev. 28; 3 Keb. 274, 287, Benson v. Baron Hudson, S. C.

(I) To what Purposes the Remainder is accounted but as one with the particular Estate, and where they are regarded as several Estates.

'If one make a lease to A for life, remainder to B for life, in tail or in fee, and A die; the law adjudges the freehold in B presently, and he is tenant to every *præcipe* till he disclaims(*a*) or disagrees to it; for both the particular estate and remainder make but one degree, and a writ of entry *sur disseisin* may be brought against him in remainder after the particular estate ended as well as it might against the particular tenant himself; and if there be tenant for life, remainder over of a seignior, and the tertenant alien in mortmain, they both shall have but one year and a day for entry; and if termor or guardian let for life, the remainder over, and he in the reversion agree, he is a disseisor as well as the tenant for life.

Hob. 71.' || (*a*) See Lord Eldon's observation on disclaimer, 1 Swanst. 372. In a

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will, the seisin of the particular tenant is not a seisin to those in remainder, to enable them to maintain a writ of entry, &c., until it is actually obtained. See 1 Inst. 111; 2 Schol. & Lef. 104.¶

‘If a disseisor make a lease for life, remainder over in fee, and the disseisee release to the tenant for life, this shall inure to him in the remainder because by the release all his right is gone; but a confirmation only of the estate for life shall not inure to him in the remainder, because nothing is confirmed but the estate for life, and then the remainder lies open without any sanction given to it. But in the other case, by the release of the disseisee to the tenant for life, all his right is gone, and the tenant for life doing wrong only during his own estate, the release can extend only to cure that wrong; and therefore for the residue must fall into the remainder. So it is, if feoffee upon condition make a lease for life, remainder in fee, and the feoffor release the condition to the lessee for life, this shall inure also to him in remainder, because the condition went to the whole estate; and therefore, being discharged, must exonerate the whole estate, whereof he in the remainder has part.

Lit. sect. 521; Co. Lit. 297.

‘If the disseisee confirm the estate of him in the remainder, without any confirmation made to the tenant for life, yet the disseisee cannot enter upon the tenant for life, because the remainder is depending thereon; and if he should defeat the estate for life, he must also defeat the remainder which he has confirmed; but this he cannot do; therefore neither can he defeat the estate for life.

Lit. sect. 521.

‘So, if a disseisor make a lease for life, saving the reversion to himself, and the disseisee confirm the reversion of the disseisor only, yet he cannot enter upon the tenant for life, because then he must draw out and defeat the reversion likewise, which against his own confirmation he cannot do, (and yet such reversion is not depending upon the estate for life, as the remainder is, but is paramount to it;) for, if a disseisor make a lease for life, and after levy a fine with proclamations, and five years pass, so that the disseisee is barred for the reversion, he shall not enter upon the lessee for life.

Co. Lit. 298.

‘If a reversion or seigniorship be granted to one for life, remainder to another in fee, attornment to the tenant for life is good to him in the remainder likewise, because both make but one estate and degree; and for this reason it is, that if no attornment be to the tenant for life, but after his death attornment is made to him in the remainder, this is void, because both making but one estate, if the first be not completed, the other cannot take effect.

Co. Lit. 310; 2 Co. 67.

‘Admittance of the tenant for life of copyhold lands is also a good admittance of him in the remainder to all purposes, except the lord’s fines, if there be a custom for two several fines; and though the first tenant were only for years, yet admittance of him is such an admittance of him in the remainder likewise, as shall make a *possessio fratris* of the remainder, and carry it to the sister of the whole blood.

Cro. Eliz. 504, 662; Moor, pl. 448, 658; Roll. Abr. 505; 4 Co. 22; Cro. Ja. 31; Mod. 102, 120; 1 Vent. 260; 2 Lev. 107; [3 Keb. 263, 329; Gilb. Ten. 194, Wat-

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kin's edit.] ||Church v. Mundy, 12 Ves. 426. How far equity interposes between the tenant for life and the remainder-man, in respect to the lord's fines, see 13 Ves. 246, 252, 253.

'Custom of a manor was, that upon surrender of copyhold land made to one and his heirs, if three proclamations passed, and he did not come in to be admitted, the lord should have it as forfeited; and there a surrender was made to the use of A for life, remainder to B in fee. A suffers three proclamations to pass without coming in to be admitted; yet it was held, that this should not forfeit the estate of B in remainder, for they are divided estates; and the custom being to forfeit one estate only, shall be taken strictly, and intended of an entire fee-simple in possession.

Cro. Eliz. 879; Yelv. 1, Baspool v. Long.

'And yet where copyholds were devisable for three lives *successivè*, whereof each to take in order as they were named; and the custom was, that they could not cut timber; the first tenant for life cuts timber: this was held a forfeiture of all their estates; the reason whereof may be, that this was but one entire estate in possession at first, though the custom after shares and divides it to go in succession; for it is held, (a) that if a copyholder for life commit waste, this shall be no forfeiture of the estate of him in remainder. (b) Wherein this diversity appears, that for the benefit of him in the remainder his estate is accounted as one with the particular estate, and therefore one admittance goes to both; but as to any prejudice which he may receive by the act of the particular tenant, his remainder is accounted as a several and divided estate, and shall not share in it.' "And so in several of the other cases before mentioned."

'Moor, pl. 149; Cro. Ja. 437. (a) Cro. Eliz. 598.' [See Gilb. Ten. 246, 250, 305, Watkin's edit.; 2 Ld. Raym. 999; 3 P. Wms. 10, note F.] ||(b) But, by special custom, a forfeiture by tenant for life of copyholds may bind the remainder-men. 9 Co. 107.||

RENT.

[ALL property, by our law, is presumed to have been originally in the crown; and the king portioned it out in large districts to the great men that had deserved well of him in the wars, and were able to advise him in time of peace. This was the nature of their tenure; and these were all the services the king expected in return for such concessions. But these large districts or countries would have been but of little use, either to the lords or to the public, if they had continued in their own hands: in such a case they must, in the midst of their large territories, have wanted almost the necessaries of life; and the public that strength and security, which land well peopled and cultivated produces and yields. Hence it became necessary to subdivide those territories; and the division must necessarily have been made among two sorts of men, to answer the several necessities of the lord and the public;—the *military men*, to attend the

lord in the field, and venture their lives for their country ;—and the *socmen*, to plough the demesnes which the lord kept in his own hands for the support of his own table, or to make an annual return of corn and other provisions for that use and purpose : and hence, by the way, the lands which the socmen held were called *farms*, from the Saxon word *feorm*, which signifies provisions.

Gilb. on Rents, 1, 2, &c.

These corporal services, as money multiplied and trade increased, were changed into money by the consent of the tenants, and the desire of the lords ; and, as the military tenure began to decline, they admitted of compositions from the feudal tenant for not attending his lord in the field, and those compositions were ascertained by parliament after the war was over, which was called *escuage*. This change of the services seems to have been for the ease and advantage of the lords ; because they were no longer obliged to carry their own provisions to the camp, when they had money from their tenants, which in every place would sufficiently provide them with all the necessaries of life.

The remedy for the recovery of rent is by way of *distress*, which seems to have come over to us from the civil law : for anciently, in the feudal law, the not paying attendance on the lord's courts, or not doing the feudal service, was punished with the forfeiture of the estate. So is Vigellius, in the title *Causæ ex quibus Feudum amittitur* ; viz. “ Si vassalus domino non serviat, fidelitatemque ei non præstet ; si vassalus, a domino ejus vocatus, non venerit ; si pactum feudi non servetur.” But these *feudal forfeitures* were afterwards turned into *distresses*, according to the pignorary method of the civil law ; that is, the land that is set out to the tenant is *hypothecated*, or has a pledge in his hands, to answer the rent agreed to be paid to the landlord ; and the whole profits arising from the land are liable to the lord's seizure, for the payment and satisfaction of it.

Besides this, the lord had another security by the feudal law for the faithful performance of his services ; and that was, the solemn engagement made by the tenant upon his first entering into the feud, by the doing *homage*, and taking the oath of *fealty* ; by which the tenant solemnly swore and undertook to bear faith to him for the lands which he held, and lawfully to do the customs and services which he ought to do at the terms assigned him ; hence came that connection between the lord and tenant, in the feudal law, that dependence and attendance of the tenant in all the circumstances of life and articles of danger ; and, in return of that service and fidelity, the utmost protection the lord could give him :—“ Debet quidem tenens manus suas utrasque ponere inter manus utrasque domini sui ; per quod significatur, ex parte domini, *protectio, defensio, et warrantia* ; et ex parte tenentis, *reverentia et subjectio*.”

This oath of *fealty* or fidelity was, we see, taken by the tenant on account of the lands holden from the lord ; for so says the tenant,—“ *that he will be faithful to the lord for the lands which he holds* ;”—and therefore this engagement must subsist while the tenure between the lord and tenant remains : and it was looked upon to be so sacred an obligation, and so necessary to be punctually observed, that originally, as we have observed, the breach of it was attended with no less a penalty than the forfeiture of the *feud* itself ; and afterwards, when the rigour of that law came to be mitigated, with a seizure of every thing that was found on the land. Now

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the distress being substituted instead of the seizure of the *feud*, we may easily account why the power of distraining always attended the *fealty*, or, as the law books termed it, was inseparably incident to it; because the power of seizure could only belong to him in whose *homage* the tenant was, and to whom the lands must return when the feudal donation to the tenant was spent; for it had been unreasonable and absurd, that the tenant should forfeit his land for not paying a service to a person to whom he never obliged himself by any oath or engagement: and hence it is, that if the lord upon the donation had reserved to himself any gabel or rent, and had afterwards granted the rent to a stranger, though the tenant had attorned, or consented to the grant, yet the stranger could not distrain for the rent; for as the power of seizure, so the distress that was substituted in its place, belong only to him of whom the lands were held, and in whom the right of *reverter* was when the feudal donation was spent; and therefore the stranger, who could pretend no such right from the grant, could have no power of seizing the *feud* for the non-payment of rent, nor consequently of distraining, because then the land would be liable to two different seizures at different times.

So it was upon lesser donations: as, if a lease had been made for life, reserving rent, and the lessor grants the rent, the grantee has no remedy for the recovery of it, for the former reason: but if the reversion itself had been granted to a stranger, the whole services incident to it had passed; and the grantee, after attornment, might well distrain, because the tenure must necessarily be of him to whom the lands must return when the feudal donation is spent; and the tenant must owe his fidelity to him whose tenant he is, because it were contradictory to make him bear faith for the same land to different persons; therefore the obligation of his first oath of fidelity must cease, since he no longer holds any land of him to whom he made it. But these things will be considered more at large in treating of rents under the following division:]

(A) Of the several Kinds of Rent: And herein,

1. *Of Rent-Service.*
2. *Of Rent-Charge.*
3. *Of Rent-Seck.*

(B) Out of what Things a Rent may issue.

(C) Upon what Conveyance a Rent may be reserved.

(D) By what Words a Rent may be reserved or created.

(E) How several Rents may be reserved in the same Deed.

(F) Of the Days of Payment.

(G) To whom Rents may be reserved or granted.

(H) Of the Continuance of the Rent, and to whom to be paid; and herein of the distinct Interests of the Heir and Executors of the Lessor.

(I) Of the Recovery and Demand of the Rent: And herein,

1. *In what Cases a Demand is necessary.*
2. *The Time of Demand.*
3. *The Place where a Demand is to be made.*

(K) The several Remedies for the Recovery of Rents: And herein,

1. *Of the Remedy by Distress.*

(A) Of the several Kinds of Rent. (*Rent-Service*.)

2. *Of the Remedy by Writ of Annuity.*
3. *Of the Remedy by Assize.*
4. *Of the Clause of Re-entry.*
5. *Of the Nomine Poenæ.*
6. *Of the Remedy by Action of Debt, and as grounded on several Acts of Parliament; || and herein of "Double Value," and "Double Rent."||*
- ||7. *Of the Remedy by Action for Use and Occupation.*
8. *Of the Remedy of Payment by the Sheriff, under an Execution against the Tenant's Goods.||*

(L) Rent when and how discharged: And herein of the Eviction of the Tenant.

(M) Of Apportionment: And herein of the Suspension and Extinguishment of the Rent.

1. *In what Cases a Rent may be apportioned by the Act of the Parties; and herein of the Difference between a Rent-Service and a Rent-Charge.*
2. *In what Cases it may be apportioned by the Act of Law or the Act of God.*
3. *The Manner of such Apportionment, and how the Tenant shall take advantage of it.*

(A) Of the several Kinds of Rent: And herein,

1. *Of Rent-Service.*

LITTLETON describes a rent (*a*) service to be where the tenant holdeth his land of his lord by fealty and certain rent; or by homage, fealty, and certain rent; or by other services and certain rent.

Lit. § 213. (*a*) So called because the ancient retribution was made by the corporal service of the tenant in ploughing his lord's demesne, which came afterwards to be changed into gabel or rent; but the service of fealty is still incident to a rent-service. Co. Lit. 142.—That suit to a mill is rent-service. Bro. tit. *Ten.* pl. 26. *β*In Pennsylvania, a *ground-rent*, *id est*, a rent reserved by the grantor of lands in fee, payable to himself and his heirs, is a rent-service, and not a rent-charge. *Ingersoll v. Sergeant*, 1 Whart. R. 337; *Franciscus v. Reigart*, 4 Watts, 98; *Kenege v. Elliott*, 9 Watts, 262. See *Hurst v. Lithgow*, 2 Yeates, 24.*g*

The services are of two sorts, either expressed in the lease or contract, or raised by implication of law. When the services are expressed in the contract, the *quantum* must be either certainly mentioned, or be such as by a reference to something else may be reduced to a certainty; for if the lessor's demands be uncertain, it is impossible to give him an adequate satisfaction or compensation for them, as the jury cannot determine what injury he has sustained.

Co. Lit. 96 a; Stil. 397; 2 Ld. Raym. 1160.

Hence it is, that the lord cannot distrain his tenant in *frankalmoigne*, for the duty of such tenant being to make orisons, prayers, and masses, and to do other divine services for the soul of the feoffor, the number of which is not expressed, the service is altogether uncertain; and therefore the remedy is before the ordinary, who may inflict ecclesiastical censures for such omission.

Lit. § 135, 136. ||By § 7 of 12 Car. 2, c. 24, (the statute abolishing tenure by knight-service,) it is provided, that the act shall not take away tenures in *frankalmoigne*, or subject them to greater or other services than they were then subject to.||

But, if the tenant holds of his lord to shear all his sheep feeding in such a manor, this is certain enough, because it is easy to compute the number within the precincts of the manor, and, consequently, what expense the

(A) Of the several Kinds of Rent. (*Rent-Service.*)

lord is at in employing others in that work, and what damages he has sustained by the omission of his tenant.

Co. Lit. 96 a; 2 Ld. Raym. 1161.

In debt for rent on a demise, *reddendum* after the rate of 18l. *per annum*; this was adjudged a void reservation for uncertainty; because it may be in corn, or in any thing satisfactory: also, an action might be brought every day or every hour, as no time is limited when the rent should be paid: and the court was the more inclined to think it a void reservation, from its being on a *lease at will*, where the time of payment of the rent should be very certain, as the tenant by holding over a day must pay the rent of the next quarter.

4 Mod. 76; Salk. 262, pl. 2; 2 Vent. 249, 270, *Parker v. Harris*; || but such a demise would now be held a demise from year to year, the rent payable at the end of a year from the tenant's entry.||

The services implied are such as the law obliges the tenant to perform when there are none contracted for in the grant; and these are more or less according to the duration of the gift: as, at common law, before the statute *quia emptores terrarum*, if the tenant made a feoffment in fee without any reservation of services, the feoffee held by the same services by which the feoffor held over; because the services being by an incumbrance on the land, which the tenant could not discharge without his lord's consent, must follow the land into whose hands soever it comes.

Co. Lit. 22, 23.

So, when after the statute *de donis* the feudal right of reverter was turned into a reversion in the feoffor, the law obliged the tenant in tail to do the same services to the donor which he was obliged to by his superior lord; because this was an estate of inheritance which possibly might have continued for ever.

Lit. sect. 19.

Hence it is, that if A seised of two acres, one holden of B by knight's service and 12d. rent, and the other of C in socage and 6d. rent, makes a gift in tail of both acres, without any reservation, though the donor has but one reversion, yet the donee holds by two distinct tenures and different services, and pursuant to the tenure and the services, the avowry of the donor must be several; because the donee must hold as the donor held over.

Co. Lit. 23.

So, if there be lord, mesne and tenant, and the mesne hold by 12d. rent, and the tenant by 4d., the tenant make a gift in tail without any reservation, the donee shall hold by the 4d. rent, because his donor holdeth of the mesne by that service; and if the donor die without issue, by which the reversion escheats to the mesne, then the donee must hold by 12d. because his tenure is then of the mesne; and the tenant must hold by the same services by which his lord holds over.

Co. Lit. 23. ||Vide *Keilway*, 125, 129.||

But the law did not make this construction on leases for lives or years, for if the lessor made no reservation the law implied none, except fealty, which every tenant that has any determinate interest must do; because it is necessary there should be some *indicium* of the tenure, since all lands must be held of somebody.

Co. Lit. 23.

(A) Of the several Kinds of Rent. (*Rent-Charge.*)

But since the statute *quia emptores terrarum*, if a man makes a feoffment in fee, or lease for life, or a gift in tail, remainder over in fee, the feoffee shall hold of the superior lord by the same services which the feoffor or donor held; for by that act the tenure upon such donations must be of the capital lord, and not of the feoffor; wherefore upon such grants there can be no rent-service reserved at this day to the feoffor, because the feoffee is not obliged to swear fealty to him, inasmuch as he is not in his homage, and, consequently, not obliged to do any services to him for lands which he holds of the capital lord.

2 Inst. 505.

But since the statute, if a man makes a lease for *life*, or a gift in *tail*, saving the reversion to himself, with the reservation of rent or other services, this is a rent-service, for which the law gives the donor or lessor a remedy by distress, as before the statute; for neither the lessee nor donee is *feoffatus* within the act, because there is a reversion in the donor sufficient to support the tenure of him.

Lit. § 214.

Therefore in the case of a feoffment in fee, or lease for life, the remainder in fee, if the feoffor reserves a rent, such rent is seck, (a) because it is unprofitable to the feoffor, he having no remedy for the recovery of it: the reason whereof is, because the land out of which the rent is reserved is not held of the feoffor, and, consequently, the feoffee is not obliged to the oath of fealty to him for lands which are held of another; and where there was no fealty due, there could be no seizure by the old law for non-performance of the services, and consequently no distress, without the particular provision of the parties. And hence the true reason appears, why to a rent-service a power of distraining is inseparably incident by the common law, without any clause in the lease or provision of the parties.

Lit. § 215; 7 Co. 24, 51; Cro. Eliz. 656; Plow. 134. ||(a) It is clear such a rent is not distrainable unless there be a clause of distress in the deed, or unless it falls within the 4 G. 2, c. 28, (*post*); Bradbury v. Wright, Doug. 624. Whether such a rent is properly a fee-farm rent seems, according to Lord Coke, (Co. Lit. 143 b,) Spelman, (Gloss. 221, col. 1,) and Blackstone (Comm. v. 2, p. 43,) to depend on its being equal to at least one fourth of the value of the land; but Mr. Hargrave thinks any rent reserved on a grant in fee is a fee-farm rent, whatever the *quantum*. See Co. Lit. 143 b, n. (5), and Britt. 164 b; 2 Inst. 44, and Doug. 627, note (1).||

β Where the tenant agrees to cultivate and bag the hop crop for the year, in payment of rent, the property in the hops is in the landlord.

Kelly v. Weston, 20 Maine, 232.

A landlord who leased to a cropper for one year, and who agreed to receive a part of the grain as rent, has a lien upon the growing crop, and the entire crop cannot be removed by the tenant or those acting under him, until the rent has been provided for.

Case v. Hart, 11 Stanton, 364.g

2. Of *Rent-Charge.*

Where a man seised of lands grants by a deed-poll or indenture a yearly rent, to be issuing out of the same land to another in fee, in tail, for life, or years, with a clause of distress, this is a rent-charge, because the lands are charged with a distress by the express grant or provision of the parties, which otherwise they would not be.

Vide tit. Annuity. β Rent-charge is a rent reserved where the landlord has no rever-

(A) Of the several Kinds of Rent. (*Rent-Seck.*)

sionary interest. *Cornell v. Lamb*, 2 Cowen, 652. A rent-charge may be taken in execution and sold. *The People v. Haskins*, 7 Wend. 463.*g*

So, if a man makes a feoffment in fee, reserving rent, and if the rent be behind, that it shall be lawful for him to distrain, this is a rent-charge, the word *reserving* amounting to a grant from the feoffee.

Lit. § 217.

A rent granted for equality of partition by one coparcener to another is a rent-charge, and distrainable of common right without clause of distress, and although there be no tenure of the sister who grants it; for as the law for the conveniency of coparceners allows of such grants, it must consequently give a remedy to the grantee for the recovery of it.

Lit. § 251, 252; Co. Lit. 170 a; Plowd. 134; Gilb. Rents, 19. So, if a rent be granted to a widow out of lands, whereof she is dowerable; Co. Lit. 169. || Littleton, § 252, lays it down that a grant of rent for equality of partition may be by parol; *sed qu.* now, in respect of 29 Car. 2, c. 3. See Co. Lit. 169 b, note (4), and Hawk. Ab. Co. Lit. ||

3. Of *Rent-Seck.*

A rent-seck is so called because it is unprofitable to the grantee, as before seisin had, he can have no remedy for recovery of it; as, where a man seised in fee grants a rent in fee for life or years, or, where a man makes a feoffment in fee or for life, remainder in fee, reserving rent without any clause of distress, these are rent-seck; for which by the policy of the ancient law, there was no remedy, as there was no tenure between the grantor and grantee, or feoffor and feoffee, and consequently no fealty could be due.

Lit. § 215, 218; Cro. Eliz. 656. [In what cases a rent-seck may be distrained for, Keilw. 104; Co. Lit. 153 a, n. 3, (14th edit.)] || But if the rent may be distrained for, can it be properly called seck? Littleton, § 218, describes a rent to be seck expressly because distress is not incident to it; and according to the resolution of the K. B., *W. Jon.* 234, the rent, in the case supposed by Littleton, (Co. Lit. 153 a, cited above,) is not strictly a rent-seck, but *quasi* a rent-service, distrainable of common right; and see Hargrave's note (1), Co. Lit. 153 a. ||

If a man grants a rent out of three acres, and grants over, that if the rent be arrear, that he shall distrain for the rent in one of the acres, this is one entire rent: but it cannot be a rent-charge for the whole, because the greatest part of the land out of which it issues is not chargeable with any distress for the recovery of it, and *denominatio sumenda à majori*; therefore it is taken to be a rent-seck, for which, by the words of the grant, the grantee may distrain in the third acre. For, whenever the remedy by way of charge for the rent is not commensurate to the rent, the rent is called seck, and the charge is only appurtenant or appendant to the rent, and does not give it its denomination. And the reason is, because if such original grant should be lost and worn out by time, and a man were to prescribe for it, if he were to give it the denomination of a charge, it would grasp more land than was originally intended to be charged; and therefore the law binds him down to the denomination of the rent as seck, and to set forth the charge as an appurtenant, that by length of time no more should be comprehended in the charge than was originally intended in the grant of that charge.

7 Co. 24 b; Co. Lit. 147.

So it is, if a rent be granted to two and their heirs out of one acre, and that it shall be lawful for one of them and his heirs to distrain for it, this

(B) Out of what Things a Rent may issue.

is a rent-seck, and the distress given to one is only an appurtenant to the rent. And this comes within the reason of the former case, because both the grantees have not a remedy by way of charge commensurate to the rent granted. But, if he to whom the distress was not limited dies, the survivor shall distrain, because the whole rent is then in him, and the remedy by distress, which was given to him and his heirs, ought in reason to be extended to the recovery of the whole estate given, and he is now in seisin of the whole rent under the first grant.

Co. Lit. 147 b; 7 Co. 24 b.

But if a rent-seck be granted, and the grantee have seisin of the rent given to him, as by the payment of a penny, &c., and afterwards the grantee be disseised of it, or be denied payment, which is a disseisin in law, the grantee may, at common law, maintain an assize for it.

* Lit. § 235; Cro. Ja. 142.

And it hath been ruled in equity, that where an annuity was devised by will to A, and the land subject to the annuity to B, that B should give seisin of the rent-seck to A that he might have remedy for the recovery of it at common law, it being the original intention of the gift that the devisee should have some benefit from it.

Moor, 626; 3 Chan. Ca. 92. || In such case if the annuity be for life, A cannot sue B for it in *debt* while the freehold interest continues. Webb v. Jiggs, 4 Maul. & S. 113.||

So, when a bill was brought for 3*l.* for a rent of 5*s.* arrear for twelve years, the equity of the bill being that the deeds by which the rents were created were lost, and consequently no remedy for the rent at law; the court, upon the plaintiff's proving constant payment till the last twelve years, decreed the defendant to pay the arrears and growing rent; for since by the payment it was evident the plaintiff had a right to the rent, and that he could not without his deeds make a title at law, therefore the court decreed the defendant to pay the rent, and so subjected his person, which possibly might not have been liable by the deed that created the rent.

Chan. Ca. 120, Collet v. Jaques; ||and see Cox v. Foley, 1 Vern. 359; Eton Coll. v. Beauchamp, 1 Ch. Ca. 121; Davy v. Davy, 1 Ch. Ca. 144.||

And now by the 4 G. 2, c. 28, it is enacted, "That all persons shall have like remedy by distress, and by impounding and selling the same in cases of rent-seck, rents of assize, and chief rents, which have been answered or paid for three years within the space of twenty years, before the first day of this session of parliament, or shall be hereafter created, as in case of rent reserved on a lease."

(B) Out of what Things a Rent may issue.

It is laid down as a general rule, that no rent can issue (*a*) out of any incorporeal inheritance which lies in grant, because they are such things in their nature as a man can never recur to for a distress.

Co. Lit. 47 a, 142 a ||(*a*) To a "common person," as Lord Coke says, for the king may reserve a rent out of an incorporeal inheritance, since he cannot distrain on all the lands of the lessee, Co. Lit. 47 a, note (1); and *antè* tit. *Prerogative*. Gilbert on Rents, 22.||

As (*b*) a common was originally granted for the benefit of the beasts of every one of the tenants, and as the right of common which every man

(B) Out of what Things a Rent may issue.

has runs through the whole common, and no particular tenant has a right to one part more than another, it follows that no (c) distress can be taken thereon, nor can the recognisers of the assize have the view of any particular part to which the grantee of the rent hath a right, and therefore cannot put him in seisin of the rent by a twig or a turf.

Cro. Ja. 679. (b) So, of a warren. Noy, 60; 3 Leon. 1.—So, of a piscary. Co. Lit. 144. (c) Though a rent cannot, for the reasons herein mentioned, issue out of a common, yet by the 11 G. 2, c. 19, § 8, it is enacted that it shall be lawful for every landlord, his steward, bailiff, receiver, or other person empowered by him, to seize as a distress for rent any cattle or stock of their tenants feeding upon any common appendant or appurtenant, or any ways belonging to any part of the premises demised.

So, rent cannot issue out of a rent, for the statute of Westm. 2, (13 Ed. 1, stat. 1,) gives an assize *in certo loco capiendo*; but a rent cannot be put in view.

Bro. Assise, pl. 2.

So it is of tithes, for a reservation of rent upon a lease of them is not good, because there is no place upon which the distress can be taken, nor any land to be put in view to the recognisers, or of which they may give him seisin.

5 Co. 3; Cro. Ja. 111, 173; *sed vide* Precentor of Paul's Ca., Co. Lit. 44 b, (3); *antè tit. Leases and Terms for Years* (E): and now by 5 G. 3, c. 17, leases of tithes and other incorporeal hereditaments by ecclesiastical persons for one, two, or three lives, or twenty-one years, are as good as if of corporeal hereditaments, and an action of debt is given to the successor for rent reserved on such leases.||

But it has been decreed in equity, that where a rent-charge of 20*l.* was devised out of a rectory, the glebe whereof amounted but to 40*s.* per annum, that the whole rectory should be liable to the payment of the rent; and the proprietor of the rectory was decreed to pay the arrears of the rent and costs.

Chan. Ca. 79; *Thorneide v. Allinton*, Gilb. on Rents, 22.

A rent cannot issue out of a hundred, fair, office, &c., for these were instituted for particular purposes, and are for public utility. So of an advowson, in which the patron has no interest but to appoint an able and fit person to the church, without making any profit to himself.

7 Co. 23; Noy, 60; Gilb. on Rents, 22.

But, though a reversion or remainder be incorporeal, and can pass only by grant, yet a rent reserved upon a grant of them is good; for though the grantor has no remedy for them during the continuance of the particular estate, yet since they relate to lands which were originally granted to make profit of, the judges have gone as far as they could to pursue the intention of such original donations, and therefore have admitted such reservations to be good immediately, since the lands in which the grantor had the reversion were originally given for that purpose, viz., to make profit of. And this construction is the more reasonable, because in this case there is a remedy by distress for all the arrears, when the reversion executes by the determination of the particular estate, whereas there is no possibility of such remedy in the case of tithes, commons, fairs, &c.

10 E. 4; 4 Bro. tit. *Distress*, 47; Perk. § 627; Co. 62, Capel's case; Co. Lit. 47 a; Gilb. on Rents, 24.

So and for the same reason it is, if the lord grants his seignior, reserv-

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ing rent; for here is a prospect, though it be distant, of a remedy by distress upon the escheat of the tenancy.

2 Roll. Abr. 446.

So, if there be lord mesne and tenant, and the mesne make a gift in tail of the mesnalty, reserving rent, this is a good reservation, because the tenancy may escheat to the donee, and then the donor shall have remedy by distress for all the arrears.

Perk. § 627; Cro. Eliz. 546.

Also if a lease ||by deed|| be made for years of an incorporeal inheritance, which lies only in grant, reserving rent, such reservation is good to bind the lessee by way of contract, for the non-performance of which the lessor shall have an action of debt, because, if the lessee undertakes to pay such an annual sum by his deed, such undertaking gives the lessor a right to it, and the law in all cases gives remedies adequate and correspondent to every man's right.

5 Co. 3, Jewell's case; Cro. Ja. 452; 2 Saund. 303; Vent. 98; Lev. 308.

As, when in covenant, for non-payment of rent, the plaintiff declared that he was seised of tithes, and by indenture demised them to the defendant, rendering rent, which he covenanted to pay, and for the non-payment thereof the plaintiff brought his action; the defendant having pleaded eviction, to which the plaintiff demurred, it was adjudged for the defendant; the court holding that this was rent, and that the eviction was a suspension of it, and therefore that the plea was good.

Ld. Raym. 77; Dalston v. Reeve, vide 5 G. 3, c. 17; ||which makes good all leases granted by ecclesiastical persons of tithes, or incorporeal hereditaments for one, two, or three lives, or twenty-one years, as if the same were of corporeal hereditaments.||

If a man makes a lease of Blackacre to commence *in futuro*, and of Whiteacre to begin *in presenti*, rendering rent, payable at Michaelmas, before the commencement of the term of Blackacre, this is a good reservation immediately, for it is but one entire rent, and as such is payable according to the reservation.

2 Roll. Rep. 467, Falstaff's case.

So it is, if a man grants a future interest in land, as, if it be a lease for years, to commence five years after the making of the lease, the lessor may reserve a rent immediately, because this is a good contract to oblige the lessee, and to ground an action of debt; and the lessor may likewise have his remedy by distress for the arrears when the lessee comes into possession.

2 Roll. Abr. 446; and vide 2 Roll. Rep. 407; Plow. 423.

A lease of the vesture or herbage of land, reserving rent, is good, because the lessor may come upon the land to distrain the lessee's beasts feeding thereon.

Co. Lit. 47; ||*Qu.* how assize shall be brought in case of herbage? 17 E. 3, 75; Hal. MSS. Co. Lit. 47 a.||

Also, the king may reserve rent out of an incorporeal inheritance, because by his prerogative he may distrain in all the lands of his lessee for such rent; and therefore, since he has a remedy for the rent, there is no reason that such reservation should not be good.

Co. Lit. 47; 5 Co. 4, 56; Lane, 39. ||Gilb. on Rents, 22.||

But, if the king's tenant makes a lease of the lands not holden of the

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king, either for years or at will, the king cannot distrain such lands in the hands of the under-lessee. So, if they are extended on an *elegit*, or if they be under sequestration; but in this last case, upon application to the Court of Chancery, liberty will be given to distrain without incurring any contempt of that court.

1 P. Wms. 306, Attorney-general v. Mayor of Coventry.

|| Although a rent cannot issue out of chattels, yet it has been decided that a distress may be made for the rent of furnished lodgings; for although the value of the premises demised is increased by the goods upon them, yet the rent issues out of the realty, and not out of the goods.

Newman v. Anderton, 2 New R. 226.||

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HERE it may be laid down as a rule, that a rent-service may be reserved upon every conveyance that passes any estate to the tenant, or enlarges an estate already in him; for the rent being an annual return by way of retribution for something given, it follows, that where no estate passes by the conveyance, there ought to be no retribution or return. Besides, the thing given was anciently in nature of a pledge for the rent, and therefore ought to be such that the giver might formerly have revested himself in, and now may have recourse to for a distress upon non-payment of the rent. Hence therefore it is, that if the disseisee releases all his right to the disseisor, reserving rent, the reservation is void.*

10 E. 4, 3; 21 H. 6, 8; Co. Lit. 144, 193; 2 Roll. Abr. 449; Gilb. on Rents, 26.

So it is, if there be lord and tenant, and the tenant hold of his lord by fealty and 20s. rent, and the lord release to his tenant, or confirm his estate in the tenancy, yielding to him a hawk or rose yearly; this new reservation is void, because there is no estate given to the tenant, for which he should make that new return of service to his lord. But the lord upon such release or confirmation may confirm the tenant's estate to hold by less services, as in this case by fealty and 5s. rent, because, by the same reason that he may release his seignory, he may likewise abridge himself of part of it.

Gilb. on Rents, 27; Lit. § 438; Dyer, 230; Mo. 631, 13; Co. 55.

If there be tenant for life, and he in reversion release to him in tail, reserving rent, the reservation is good, because the tenant's estate is enlarged by the release, and therefore the rent reserved ought to be paid in return for the inheritance given, and the lessor has immediate remedy by distress for recovery of it. So, upon a surrender by deed, rent may be reserved.

Gilb. on Rents, 27; 10 E. 4, 3; Co. Lit. 193 b; 2 Roll. Abr. 449.

So, if the lord of a manor, by indenture at common law, releases to his copyholder in fee, to him and his heirs, or confirms such lands to his copyholder and his heirs, reserving a rent, this reservation is good, because the release or confirmation inure by way of *mitter le estate*, to pass an estate at common law to him, where before he had but a copyhold or customary estate at will. But upon a release or confirmation, which inures by way of *mitter le droit*, no rent can be reserved; and in the other case, though the reservation, be it by indenture or deed-poll, be good, yet, without clause or distress, it is only a rent-seek.

13 Co. 55, Samme's case; Co. Lit. 193. || See Bradshaw v. Lawson, 4 Term R. 443; Doe v. Huntington, 4 East, 271.||

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So, upon a release that inures by way of *mitter le estate*, as when one joint-tenant releases to another, a rent may be reserved. But *quære*, if such release carries the fee-simple, whether such rent be a rent-service, (a) inasmuch as the releasee being in from the first feoffor, there can be no tenure of the releasor, and consequently the rent must be seek, unless there be a clause of distress in the deed of release; for so it is in the case of a feoffment in fee since the statute *quia emptores terrarum*, as is before observed.

Co. Lit. 193; Gilb. on Rents, 28. ||(a) It is clear that it is not. *Bradshaw v. Lawson*, 4 Term R. 443.||

|| If the lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services, for the tenant, by reason of the statute *quia emptores*, must henceforth hold of the superior lord.

Bradshaw v. Lawson, 4 Term R. 443.

Where the lord of a customary manor, by his deed, made since the statute of *quia emptores*, granted to his customary tenant, who then held by the payment of certain customary rents, and other services, that in consideration of a sixty-one penny fine, (or sixty-one years' rent,) he, the lord, *ratified and confirmed* to the tenant and his heirs all his *customary and tenant-right estate*, with the appurtenance, &c., and granted that the tenant and his heirs should be thereof *freed, acquitted, exempted, and discharged from the payments of all rents, fines, heriots, &c., dues, customs, services, and demands*, at any time thereafter happening to become due, in respect of the tenancy, *except* one penny yearly rent; and also *excepting and reserving* suit of court, with the service incident thereto, and saving and reserving all royalties, escheats, and forfeitures, and all other advantages and emoluments belonging to the seignory, so as not to prejudice the immunities thereby granted to the tenant; and also granted to cut timber, and to sell or lease, &c., without license: held, that such confirmation to the tenant of his customary and tenant-right estate, freed, &c., from all rents and services, except, &c., was tantamount to a release of those rents and services not specifically excepted; and that by virtue thereof the customary tenement became frank-fee, or held in fee and common socage; and that the old customary estate, which before was not devisable, was extinguished, and became thereupon devisable by the statute of will. Such customary estates, which are peculiar to the north of England, are not freehold, but seem to fall under the same general consideration as copyholds, though alienable by bargain and sale and admittance thereon, and not holden at the will of the lord.

Doe d. Reay v. Huntington, 4 East, 271.||

At common law no rent could have been reserved upon a bargain and sale, because only a use passed, which was not any estate to which the bargainor could have recourse for a distress; but now by the statute 27 H. 8, c. 10, the possession is executed to the use, and therefore the bargainor may now have recourse to the land for a distress.

2 Inst. 673; 2 Co. 53; Co. Lit. 144 a; Cro. Eliz. 595; Gilb. on Rents, 28.

There can be no rent reserved upon any conveyance that inures by way of extinguishment of the estate of the grantor, because in such case there is no reversion left in him to create a tenure; and therefore, if a lessee surrenders his estate, reserving a rent, the reservation is not good. But this case put by Rolle must, it seems, be understood of a lease for life; for

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such a reservation may be good by way of contract, upon a surrender of a lease for years; for when the lessor takes an assignment or surrender of the lessee's term, he agrees to take it under such a yearly rent; and such agreement or contract is a good foundation for an action of debt if it be not performed, whether the agreement be by deed or parol.

2 Roll. Abr. 449; but see Allen, 57; Gilb. on Rents, 29; 2 Lev. 80; Raym. 222; 2 Mod. 174, Winton v. Pinkney; and Lutw. 364; Ld. Raym. 82, Sir John Brownlow v. Hewley.

|| So also where the assignee of a term entered into an agreement with the lessor that the latter should have the premises as mentioned in the lease, and should pay 8*l.* 10*s.* over and above the rent annually, towards the good-will already paid by the assignee; it was held, that the agreement operated as a surrender of the term, and that the sum of 8*l.* 10*s.* was an annual payment *in gross*, which might be recovered in *assumpsit*, but was not rent for which the assignee could distrain.

Smith v. Mapleback, 1 Term R. 441; and see 2 Wils. R. 375.||

So, if a rent be reserved upon a feoffment in fee, though the feoffor hath no reversion, yet this is a rent, and recoverable by the name of rent upon the contract.

Carth. 162.

[A rent cannot be reserved on a fine *sur cognisance de droit come ceo*, or on any other fine which is executed: but, if an estate for life only be conveyed by the fine, the cognisor may reserve a rent with a clause of distress.

Bro. Abr. tit. *Fines*, p. 30; Roll. Abr. tit. *Fine*, O, p. 10.]

|| An agreement for a future lease at a rent certain is not a sufficient reservation of rent, and will not constitute a demise: and where a party is let into possession under such an agreement, the lessor cannot distrain, but must resort to his action for use and occupation.

Hegan v. Johnson, 2 Taunt. 148; Dunk v. Hunter, 5 Barn. & A. 322.||

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β THE following is extracted from Ham. N. P. 416.

Rents and services are *reserved*, either by *operation of law*, or by the *agreement express* or *implied* of the parties to a tenure.

An example of the *first* occurs in the instance, where a feme is endowed of land, in which case, she pays and performs to the heir a third part of the rent and beneficial service that he renders over. (a) And another example is, when tenant in fee-simple holds by a rent or service incapable of division, as by the rent of a horse, or by the service of suit to court: here, if he aliens parcel of the land under the statute of *quia emptores*, the new tenant shall pay the same as the old one, and thus are the duties multiplied; and this from necessity. (b) The provisions of the statute of George the Second, as they are recited in the note below, (c) afford another instance of a reservation created by operation of law.

(a) Keilw. 125. (b) 6 Rep. 1, Bruerton's case. (c) 11 Geo. 2, c. 19, s. 18. "In case any tenant shall give notice of his intention to quit the premises by him holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained; that then the said tenant or his personal representative shall from thenceforward pay to the landlord *double the rent* which he should otherwise have paid, to be levied, sued for, and recovered at the same times, and in the same manner, as the single rent or sum before the giving such no-

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tice could be levied, sued for, or recovered; and such double rent shall continue to be paid during all the time such tenant shall continue in possession as aforesaid." Vide Bl. Rep. 533, *Timmins v. Rawlison*; Cowp. 243, *Doe v. Batten*; 8 East, 358, *Cobb v. Stokes*.

With regard to an *express* reservation the following rules may be laid down, and herein of rules which are common as well to this as to the other two species of reservation.

1. It must not be *inconsistent* with the grant; as, if land be given in flank-marriage, in this word it is implied that no render shall be made until the fourth degree be past; therefore, a stipulation, that performance of the duty reserved shall commence immediately, is of no avail.(a)

(a) 4 Hen. 6, Easter, 6, p. 22; Owen, 26, *Webbe v. Potter*.

2. It should *not* be of a *nature* which will *render* the *land* wholly *unproductive* to the tenant; and, therefore, a reservation of the entire profits of the tenement is void.(b)

(b) Vide *Latch*, 269.

3. It may be in the *disjunctive*, to render one description of rent and service, or another. In such case, before the day of payment it is in the tenant's election which he will render; but after it is past, the reversioner may claim which of the two he pleases.(c) If the *day* of payment is in the *disjunctive*, as, to render a pair of spurs at Easter, or twenty shillings at Michaelmas, and the tenant does not render the spurs at Easter, nothing is due till Michaelmas, for he has not yet made his election.(d) And the same rule holds, where the rent is reserved payable (e. gr.) at Michaelmas, or within thirteen weeks after; the lessee need not pay it before the expiration of the thirteen weeks.

(c) *Moore*, pl. 215, p. 85; *Keilw.* 78. (d) Vide *Bendl.* 158, *Pate v. Hicks*.

4. If the reservation is general, not limiting in certain the *time* of *payment*, the duties are to be rendered at the end of the year, for they are reserved as a recompense for the profits of the land, which do annually arise and are annually renewed, and therefore, this is the probable intention of the parties. There is no occasion for their being reserved every successive year; the reservation may be every second, third, or other year, according to the agreement of the lord and tenant.(e) If the reservation be annually during the term, the first payment to commence two years after the date of the demise, this last stipulation controls the generality of the former words.(g)

(e) *Keilw.* 128, the reservation may be to the heir, without naming the ancestor. *Hobart*, 130. (g) *Plowd.* 164, *Hill and Grange's case*.

5. It must be made to the grantor himself or to his personal representative, (the reversion being a chattel interest,) or to his heir, (the future interest being freehold,) or to his assign; it cannot be to a *stranger*.(h) and if such be attempted, it will operate only as a contract.(i)

(h) 8 Rep. 138, *Whitlock's case*; 1 Brownl. p. 80, *Whitton v. Bye*; Owen, 92, *Bottenham v. Herlakenden*. The king, it seems, may reserve rent to a stranger. Owen, 90. (i) 1 Leon. pl. 362, p. 269.

6. As the law permits the landlord to *reserve* the duties *generally*, without designating to whom in particular they are to be rendered, this will in all cases be the safer course.(k) Because

(k) 3 Bulstr. 329. In such case the reservation will continue operative as long as the tenure lasts. 2 Leon. pl. 271, p. 214.

7. It is made a question, whether if the reservation be only to the

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grantor, without adding the word "heirs," if the future interest be an inheritance, or "personal representative" where it is a chattel, the duties shall continue to be rendered beyond the grantor's life; and the weight of authority seems to be against their continuing.(a) A learned writer, however, is of opinion, that the reservation shall not determine with the life of the grantor; "for," says he, "there are not only justice and equity upon the side of the heir, but also principles of law, namely, that the rent is incident to the reversion."(b) Under all due correction, I do not feel the force of the last argument at the least. If it could be established, that the rent is inseparably from, and can only be destroyed by the determination of, the reversion to which it is annexed, it would at once conclude the question; but, inasmuch as the law is the other way, (c) there is a difficulty in applying the reason lastly assigned. As to the former one, all will depend upon the simple question, what was the intention of the parties to the tenure? For that must be the governing principle in the exposition as well of this as of all other compacts; (d) and if it can be established, that according to the understanding of the parties, the duties were to determine with the life of the grantor, it would be most inequitable and unjust to continue them beyond it. If an opinion might be hazarded, it would be, that, in such a case, by the death of the landlord, the duties are extinguished; because,

(a) But if from the whole tenor of the reservation, an intention that the rent shall continue beyond the life of the original grantor can be collected, the neglect to use apt words may not be material; and therefore, if a termor was to underlet, reserving rent to himself and his *heirs*, the rent would go to his personal representative; or if tenant in fee reserves the duties to himself and his *executors*, they will continue to his heir. Vide 1 Vent. 162. Whether the word "assigns" can have so extensive an operation may be questionable, and the solution of the question will, I apprehend, very much depend upon the circumstance, whether the words creating the reservation are those of the landlord or the tenant: however, vide 1 Vent. 162, citing 27 Hen. 8, 19. (b) 2 Saund. 368, n. (2). (c) Vide *infra*. Vide Owen, 2. (d) 5 Rep. 112, Mallory's case; Gob. 516, p. 449; Bendl. 182.

8. If there is any *ambiguity* in the terms in which the reservation is conceived, it shall be *construed* in favour of the tenant, if the words are the words of the lord, and *vice versa*.(e)

(e) Plowd. 171; Latch. 45, 101.

9. The reservation will *follow* the *nature* of the *interest* in the *land* granted; as if two are proprietors in severalty of two acres, and they join in a lease (which we assume does not inure by way of estoppel) (g) of both acres, reserving a rent to themselves jointly; here the word "jointly" will be of no avail, and the render shall be several, (h) if the thing reserved is capable of division; but if it cannot be apportioned, then, I apprehend, the reversion (being the words of the lord) as such would be void.

(g) Vide 1 Vent. 161. (h) Plowd. 164, Hill and Grange's case; Keil. 134; Ca. 114. Vide 2 Wilson, 232.

So, if joint-tenants of land lease it to another, reserving a rent to one of them alone, still it shall inure to both.(i)

(i) 27 Hen. 8; Trin. 6, page 16. Vide Hetl. 64; Poph. 145. If tenant in fee makes a lease reserving the rent to himself and his executors, the reservation as to them is void. So if lessee for years was to lease the premises with a reservation to himself and his heirs, this would be a nullity *quoad* the heir. 1 Vent. 161. A reservation is but a return of something back in retribution of what passes; and therefore shall be carried over to the party who would have succeeded in the estate if no lease had been made, if it may, as where the reservation is general. Ibid. If tenant in

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tail makes a lease reserving a rent to him and his heirs generally, the rent shall go to the heir in tail. Ibid. 162. If tenant for life, with power to make leases, lease the land, reserving rent to him and his heirs and assigns, the remainder-man shall have the rent upon this reservation. Ibid.

10. It will likewise follow the nature of the estate granted, as where one acre is leased for life, and another for years, rendering twenty shillings rent for the whole, in such case, ten shillings shall issue out of the one acre, and the remaining ten out of the other, and so they are several rents.(a)

(a) Vide Keilw. 115.

11. The rent need not be reserved absolutely and at all events: as in other compacts so in this, the party's right may be made conditional, to vest only by the performance of some precedent act by the lord, as a demand of the rent, or the like.(b)

(b) Vide Keilw. 128; Ca. 95.

12. Though the demise is entire, as of two acres, yet the reservation may be split into parcels, as that so much shall issue out of this acre, and so much out of that.(c)

(c) Moor, pl. 241, p. 97.

13. If land and personal chattels are leased together reserving a rent, the whole rent issues out of the land alone.(d) It is the intention of the parties, that the sum reserved should be placed upon the footing of a rent, (as that it shall be distrained for if arrere,) and that intention can only be accomplished by holding as we have just mentioned.

(d) Cro. Eliz. 255; Emott v. Cole, 623; Collings v. Harding, Latch. 99. Vide Winch. 47; Lane. 110. In 13 Hen. 8, M. 5, p. 11, it is said, that if land and goods be leased, and the land is evicted, the rent shall be apportioned.

14. It belongs to this branch of the subject to state, that after a tenure has been created, the duties by which the tenant holds, cannot be changed by any future agreement made between the parties.(e) Thus, a money rent cannot be altered to the rent of a rose.(g) Nor can the amount be increased; (h) though as we shall hereafter see, it may be abridged.

(e) 10 Hen. 7, Easter, 26, p. 23. (g) 9 Hen. 6, Easter, 22, p. 9. (h) 9 Hen. 6, Easter, 22, p. 9.

15. No technical expressions are essential to a reservation; any words which denote the intention of the parties will be sufficient. Therefore, the words "covenant and agree," have the same operation as the word "reserve;" (i) though they will differ from it in this respect, that they are the words of the termor, and will in case of obscurity be construed in the landlord's favour. Nor is the word "rent" necessary to be used in creating a rent; for if the tenant agrees to pay ten pounds a year, this will be a rent, and not a sum in gross, for the intention of the parties to consider it such is apparent.

(i) Owen, 151, Alfo's case. So "provided always that the tenant shall pay yearly 20l. is a reservation, and not a condition." Moore, pl. 638, p. 459. Vide etiam 1 Roll. Rep. 80, Athowe v. Herring; Wm. Jones, 231, Drake v. Munday.

A reservation created by implied agreement is illustrated in the case, where land is given to hold of the donor without making a special reservation: here the new tenant holds of his landlord by the same rents and services as he renders over; for he has the usufruct in return for which they were originally reserved; at least, so it has oftentimes been held.(k) And this may give us the original of pepper-corn rents, which at the first, per-

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haps, were reserved in the case where it was intended that no remuneration should be yielded by the tenant, in order to exclude this implied obligation.

(k) 10 Edw. 3, 46, p. 25; 2 Hen. 6, M. 13, p. 11. Vide Keilw. 122; Ca. 76.

As to the *formalities* essential to *create a reservation*; none others need be observed than those which are necessary to create a tenure; and these, but only to a certain extent, will be hereafter pointed out.^g

A rent-service being something in retribution for the land that passes, it must be reserved by such words as imply a return of something that was not in the grantor before, in lieu of the land given; and therefore *reddendo, reservando, solvendo, faciendo, inveniundo*, and such like, are proper words by which a rent may be reserved.

Co. Lit. 47 a; Perk. § 625; Plow. 142; 2 Roll. Abr. 449; Gilb. on Rents, 30.

But, if a man makes a lease of lands, except 12d. or *præter* 12d. rent, these are no good reservations, because these words are only proper to reserve to the lessor part of something in being, which would otherwise pass by the lease.

Perk. § 639. ||But that "reserving" hath some times the force of "saving" or "excepting," see Co. Lit. 143 a, and also note (1) Ibid.; and Vin. Abr. tit. *Reservation*.||

So it is, if a man makes a lease, *salvo* or saving 20s. rent, this is no good reservation, because there can be no saving of anything not in being; consequently, a rent-service being a return of something not in the lessor, in lieu of the land given, cannot be reserved by words, that, in their most extended signification, can only preserve something already *in esse*.

2 Roll. Abr. 449.

But, if there be lord and tenant by knight's service, and the tenant make a gift in tail, to hold by a penny *salvo forinseco servitio*, that is, saving to the tenant such service by which he held the land of his lord; this is good to make the donee hold by knight's service; for though the tenant had not that service in himself, before the gift, yet it was a service in being, for the tenant was obliged to do it to his lord; and therefore it is but reasonable that he might save that service to himself, which he was at the time of the gift obliged to perform to another.

Perk. § 650.

So it is, if there be lord, mesne, and tenant, and the mesne hold by knight's service, and the tenant by socage; if the tenant make a gift in tail reserving rent, and saving the knight's service, the donee in this case likewise shall hold by knight's service; because this service was in being and chargeable upon the land at the time of the gift, though the tenant was not obliged to it himself, and therefore may be reasonably saved to him who parts with the land upon which it was before chargeable: and the rather, because such construction is most beneficial to the public, and the donee not injured; because he willingly takes it under such charge.

2 Roll. Abr. 449.

By articles of agreement indentured between A and B it is covenanted and agreed, that A doth let Blackacre to B for five years from Michaelmas following; provided always, that B shall pay at Michaelmas and Lady-day 10l. by even portions yearly. This proviso is a good reservation of the rent; for as the words amounted to an immediate demise of the lands, so the rent, which is but a retribution for the land, ought to be paid

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immediately; and it cannot be construed to be a sum in gross, because by the words of the articles (which being indentured are the words of the parties) it is to be paid yearly.

Moor, 459; Cro. Eliz. 486, *Harrington v. Wise*.

If lands be leased to A, and he covenant and grant to render and pay for the said lands every year, during the said term, to the lessor, his heirs and assigns, 10*l.*; this amounts to a reservation. So it is, if the lessor covenant that the lessee shall hold and enjoy the land, and the lessee *in consideratione præmissorum* covenant to pay to the lessor, his heirs and assigns, an annual rent of 10*l.* during the term: for here the rent is plainly given as a retribution for the land which the lessee holds; and this being by indenture, the words are looked upon to be spoken by both parties, and these may reasonably be construed, that the lessor, in consideration of the land demised, reserves the rent agreed on by way of retribution or return: and therefore it has been adjudged, that such rent goes with the reversion to the heir; and the executor of the lessor shall never recover it by way of covenant.

Plow. 131; Cro. Car. 207; Roll. R. 80; Cro. Ja. 398; 2 Bulstr. 281; Jon. 231; Hardr. 325; Co. Lit. 47 a, n. 7, (14th edit.) ||But if there be *reddendo* rent, and the lessee covenants to pay two capons, there it seems to be only covenant. *Bruerton's Ca.*; Hal. MSS. Co. Lit. 47 a, note (7.)||

β If the father-in-law by a parol gift of land to his daughter and son-in-law, induce them to settle on and improve the land, and afterwards evicts them, the son-in-law is entitled to recover the value of the ameliorations by him added to the land, but not the value of the improvements. The father-in-law is not entitled to recover rent from the son-in-law.

James v. M'Kinsey, 4 J. J. Marsh. 626.

A tenant having married the daughter of his landlord, after the expiration of his lease is told by his father-in-law that he may continue to occupy the land, without making any new stipulations for rent. Held, that under this permission he was not liable for rent which accrued during the life of his father-in-law.

O'Bannon v. Roberts' heirs, 2 Dana, 54.g

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HERE the difference is to be observed between a rent reserved entire in the *reddendum*, upon a demise of several things in the same lease, (for there, though the rent be after apportioned to the particular parcels leased, yet the reservation shall be taken as one and entire,) and where the rent is not at first reserved entire, but upon the reservation is several and apportioned to the several things demised. For instance, if a lease be made of several houses, rendering the annual rent of 5*l.* at the two usual feasts, viz., for one house 3*l.*, for another 10*s.*, and for the rest of the houses the residue of the said rent of 5*l.*, with a clause of re-entry into all the houses for non-payment of any parcel of the rent; this is but one reservation of one entire rent; because all the houses were leased, and the 5*l.* was reserved as one entire rent for them all, and the "viz." after does not alter the nature of the reservation, but only declares the value of each house.

Hob. 172; 5 Co. 54; Moor, 51, 199; ||1 Anders. 173; 3 Leon. 124; Gouldesb. 15; ||*Knight's case*, Gilb. on Rents, 34.

But, if the lease had been of three houses, rendering for one house 3*l.*,

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for another 20s., and for the third 20s., with a condition to re-enter in all for the non-payment of any parcel, these are three several reservations, and in the nature of three distinct demises, for which the avowries must likewise be several; for each house in this case is only chargeable with its own rent, the entire sum not being at first reserved out of all the houses demised, and afterwards apportioned to the several houses, according to their respective value, as in the former cases; but the particular sums are at first reserved out of the several houses; and therefore the non-payment of the rent of one house can be no cause of entry into another.

Dyer, 309; 5 Co. 55; Moor, 98, Winter's case.

So, if the lord had reserved out of one house 3l. during five years, and 20s. out of another house during ten years, and 20s. out of the third house to commence ten years after, these are distinct reservations and several demises; and each house is subject to a distress but for his own rent.

5 Co. 55; 2 Roll. Abr. 448.

Tenant in tail demised the site and demesnes of a manor which had accustomedly been let, and also all the manor, and all lands and tenements belonging to it; *habendum* the said site and demesnes, and also the said manor and premises for twenty-one years; yielding and paying for the said site and demesnes 10s., and yielding for the said manor and premises 20s. This was adjudged a good lease for the site and demesnes which had been accustomedly let; but for the other parts of the manor not usually let, the lease was void;* and the whole lease was not held to be void, because that these were several reservations, and so in nature of several leases.

Cro. Eliz. 341, Tanfield v. Rogers. *It was void by 32 H. 8, c. 28, § 2.

If a lease be made of two manors, *habendum* one manor for 20s. and the other manor for 10s., these are several reservations, and each manor is charged with its respective rent.

4 Leon. 30.

A made a lease of a cellar for a year, and if at the end of the year the parties should agree that the demise should continue, then to have and to hold the same for three years, *reddendo inde annuatim durante dicto termino* 40s., this is one entire reservation as well for the first year as for the three years; for the words *dicto termino* extend to both terms indifferently.

10 Co. 106; Hob. 276, Humphrey Lofield's case.

And as there may be several reservations in the same lease by the words of the parties, so there may be by act of law; as, where a lease for life is made to an abbot or bishop in their public capacities, and to J S reserving a rent, the lessees are not joint-tenants but tenants in common; and therefore the reservation of the rent must be several, and the reversion, to which the rent is incident, must follow the nature of the particular estates on which it depends, and therefore must be several too.

Moor, 202.

So it is, if there be two tenants in common, and they make a lease for life, rendering rent, this reservation though made by joint words shall follow the nature of the reversion, which is several in the lessors, and therefore they shall be put to their several assizes if they be disseised, as if there had been distinct reservations. But, if the reservation had been of a horse or hawk, which is not in its nature severable, then for the necessity of the case the law admits them to join in one assize.

Lit. § 314; Co. Lit. 107 a; Moor, 202.

(F) Of the days of Payment.

THESE are either by the particular appointment of the parties in the deed, or by appointment of law in default thereof. And here it is regularly true, that the law will never control the express appointment of the parties, where such appointment will answer their intention ; but, though there be particular days mentioned in the deed for the payment of the rent, yet, if the manner of such appointment will not fully answer the design of the contract, the law in such case will alter or transpose the words of the deed ; because it is the great end of the law to execute all contracts, however unwarily or inartificially framed, according to the purport and true intention of the parties upon the whole deed. Thus for instance, if A makes a lease to B the 6th of August, rendering yearly the rent of 40s. at the two feasts of the year, viz., at Lady-day and Michaelmas, by equal portions ; though in this case by the appointment of the parties Lady-day be the first term mentioned, yet the first payment shall be made at Michaelmas ensuing the date of the lease ; for without such (a) transposition the intention of the parties could never be fulfilled ; because the rent is reserved annually, and the lessor would lose the profits of one half-year, if the rent was not payable at the first Michaelmas ; for then the lessee must enjoy the land from the date of the lease to the first Michaelmas, without paying any thing ; and so likewise from the last Lady-day of the term to the expiration of it ; because though the lease ended in August, yet the payment was not to be made till Michaelmas, before which the lease expires.

Gilb. on Rents, 48 ; Hob. 172 ; Co. Lit. 217 ; Plow. 171 ; 2 Brownl. 221. (a) That the law will marshal the payments, 2 Roll. R. 213 ; 5 Co. 112 ; 3 Bulstr. 328 ; 2 Jon. 109.

If a man makes a lease the first day of May, reserving rent payable quarterly, this shall be intended quarterly from the making of the lease ; for if the beginning of the quarter should be construed to be any other day than the date of the lease, the lessor would lose the profits of his land for some time, and, consequently, not have a quarterly payment during the continuance of the lease ; [or the lessee would be obliged to pay a quarter's rent before he had received a quarter's profits of the lands.]

2 Roll. Abr. 450 ; Gilb. on Rents, 50. β When rent is payable quarterly, nothing is due until the arrival of the stipulated time of payment. *Fitchburn Corp. v. Melven*, 15 Mass. 268. See *Wood v. Partridge*, 11 Mass. 488.g

If a lease be made for years, provided that the lessee shall pay for it at Michaelmas and Lady-day 10*l.* by even portions during the term : though this rent be not made payable yearly, yet the law construes it to be so, because it is payable at the two feasts during the term ; and then, consequently, it must be paid yearly, because, if there be an omission of the payments any one year during the lease, it is not paid at the two feasts during the term.

2 Roll. Abr. 449.

If a lease for years be made, rendering rent at the four feasts, without saying yearly, yet this shall be construed to be yearly during the term.

Sid. 316. β When the lease is for a year, and no time is mentioned for the payment of the rent, it is payable at the end of the year ; and if the property be sold by the sheriff upon a judgment prior to the date of the lease, the rent will go to the purchaser, although it may have been assigned by the landlord to a third person before the sale. *Mennough's Appeal*, 5 Watts & Serg. 432.g

So, if the rent had been payable yearly, without saying during the term,

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yet the payment must be made every year during the continuance of the lease.

Moor, 459.

A lease reserving rent *pro quolibet anno* is all one as if it had been made payable annually, and then it is to be paid at the end of every year.

Lutw. 231.

A (a) rent generally reserved is payable at the end of the year, but (b) if rent be reserved *annuatim durante termino predicto*, the first payment to begin two years after, this controls the words of reservation. So, (c) if a rent is made payable yearly, during the time the lessee shall enjoy the land, the lessor cannot demand this rent half-yearly, but must wait to the end of the year.

(a) Latch, 264. (b) 3 Bulst. 329. (c) Lit. Rep. 61 ; Hetl. 53.

If a man grants a rent of 10l. to another, payable at the two usual feasts of the year, this shall be intended by equal portions, though it be not so mentioned in the deed ; because where there are two several days appointed for the payment, it is the most equal construction that a moiety of the rent shall be paid at each day.

2 Roll. Abr. 450 ; Noy, 18.

And if a lease be made, rendering rent at the two usual feasts in the year without specifying what feasts in certain, the law construes such payments to be at Michaelmas and Lady-day, because these are the usual days appointed in contracts of this nature for such payments.

2 Roll. Abr. 450 ; 2 And. 122.

Lessee for life made a lease for twenty years, if he so long lived, reserving yearly, during the term, 100l., at Michaelmas and Lady-day by equal portions, or within thirteen weeks after every of the said feasts. If the lessor dies after Michaelmas and within the thirteen weeks, there is no rent due for the last half year, because the lessee has election in this case either to pay the rent at Michaelmas, or at any time during the thirteen weeks ; and if it be not paid at Michaelmas, (d) it is then the same as if the rent had been made payable thirteen weeks after Michaelmas only ; and, consequently, the lessor dying, and the lease thereby determining before the rent became due, the lessee shall not be obliged to make any return or retribution for a thing he has not enjoyed to the day he was to make the retribution. (e)

10 Co. 127, Clun's case ; Cro. Ja. 310, 500 ; Cro. Eliz. 380, 565, 575 ; 4 Leon. 247. ||(d) If the lessee pay his rent before the day, it is voluntary and not satisfactory. 10 Coke, 127 b. Therefore, if there be a condition of re-entry for non-payment of the rent, rent paid before the day will not save the condition, if on demand it be not paid at the day. Cro. Eliz. 15. But it seems such payment would in equity be deemed satisfactory. Rockingham v. Penrice, as reported by Mr. Swanston in his note to *Ex parte Smyth*, 1 Swanst. 346. || (e) At the death of tenant for life a proportionable part of the rent shall be paid to the executors. 11 G. 2, c. 19, § 15. || *Vide post*, p. 478. ||

But, if tenant in fee makes a lease for years to begin at Michaelmas, rendering 100l. *per annum*, at Michaelmas and Lady-day, or within ten days after every feast ; it seems, by the better opinion, that the rent is due the last Michaelmas-day of the term, without any regard to the ten days ; for the reservation being annually at the two feasts, or within ten days, it shall be construed at the end of every ten days during the term, as most agreeable to the design of the contract ; and therefore the law rejects the ten days after the last feast, because the term ending at Mi-

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chaelmas, there cannot be ten days after it during the term for payment of the rent. And this construction is the more reasonable, because to give the lessee his election to make the last payment either at Michaelmas or within ten days, as in the former case, were to put it in his power to avoid the payment of the last half-year's rent; for if it were construed not to be due till the end of the ten days, the lessor could never oblige him to pay it, because then the term would be ended before the rent became due; but the addition of the ten days was only to enlarge the time of payment, not to prevent the payment, or to remit any part of the rents.

Cro. Ja. 227, 233; Yelv. 167; Brownl. 105; 2 Brownl. 220; Bulst. 1, Barwick v. Foster.

Debt upon an obligation, condition that whereas the plaintiff had demised to the defendant all the tithes of W, which if the defendant shall peaceably enjoy from 20th February, 1661, *usque* or until Michaelmas, 1668, the said defendant paying every half-year the sum of 30*l.*, viz., on the 29th day of September and Lady-day, or twenty-one days after each feast during the term, that then, &c., and breach was assigned in non-payment of the rent at Michaelmas, 1668, to which the defendant demurs, because the enjoyment being to be *usque* or until Michaelmas, 1668, this excludes Michaelmas-day; and so the term is ended before Michaelmas, 1668, and then no rent can be due at Michaelmas. But the court were clearly of opinion, that Michaelmas-day in this case was to be taken inclusively; and Hale cited the Earl of Northumberland's case, who declared on a demise at will, rendering rent at Michaelmas and Lady-day, and declared that the defendant enjoyed the land *usque festum Sancti Michaelis*, and demanded rent due at Michaelmas; and there it was moved that *usque festum* excludes the feasts; and therefore the will being determined before the feast, the rent was not due: but it was there ruled that *usque* included the day.(a) And they said, that agreements were not to have such constructions as pleadings, but to be taken according to the intent of the parties, and being *usque* such a day, the day ought to be commenced before the time is come. And they agreed that the reservation *during the term* goes to both feasts, viz., 20th February, 1661, and Michaelmas, 1668, and that the word *usque* shall be taken inclusively: for without such construction no rent would be then due, because the term would be ended before Michaelmas; and they relied upon the case in (b) Leon, and though there be election given to pay on the said days, or twenty-one days after, yet this is not material when the last feast comes, for then it was absolutely due on that day; and though (c) Cro. Eliz. and Yelv. seem contrary, yet they were not regarded, for otherwise the lessor would lose the last quarter.

M. 27, Car. 2, in B. R., Biggon v. Bridge; 3 Keb. 534, S. C. || (a) That the word "until" may be construed exclusive or inclusive of the day to which it is applied, according to the context, see Rex v. Stevens, 5 East, 244. || (b) 3 Leon. 211; (c) Cro. Eliz. 702; Yelv. 74, Umble v. Fisher.

In debt for rent the plaintiff declared on a demise, bearing date the 25th Aug., 11 W. 3, for seven years from the 24th June before, paying quarterly at the four most usual feasts in the year, or within twenty-one days after each of the said feasts, || to wit, Michaelmas, St. Thomas, Lady-day, and Midsummer, || 3*l.* 10*s.*; the first payment to be made at Michaelmas next ensuing the demise, &c.; and further declared that 14*l.* of the said rent

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was in arrear for one year ended the 24th December, 13 W. 3; for which, &c., to which the defendant demurred; and it was objected, that the year did not end the 24th December, but at St. Thomas's day, according to the *reddendum*, which is 21st December; which the court admitted, and held, that where special days of payment are limited by the *reddendum*, the rent must be computed according to the *reddendum*, and not according to the *habendum*; and that the computation of the rent, according to the *habendum*, is only when the *reddendum* is general, viz., yielding and paying quarterly so much rent.

3 Ld. Raym. 819; Salk. 141, pl. 7; 7 Mod. 96, *Tomkyns v. Pinsent*.

¶ If the rent be payable at Easter, and the tenant pays the rent in the morning of that day, and the lessor dies at two hours before noon of the same day, this payment is voluntary; and yet it is a good satisfaction against the heir. (a)

10 Co. R. 127 b; (a) The case of *Lord Rockingham v. Penrice*, appears *contrà*, as reported in 1 P. Wms. 177; Salk. 578; but it seems from Mr. Swanston's note, *Ex parte Smyth*, 1 Swanst. 346, that the rent in that case was paid not *on* but *before* the day of payment.

Rent, it seems, should be tendered at such a period before sunset as leaves sufficient time for counting the money.

Tinckler v. Prentice, 4 Taunt. 549; 1 Swanst. 343, note.

β A personal tender before distress, makes the latter tortious, and such tender afterwards, and before impounding, renders the detainer unlawful; but tender, after impounding, makes neither the one nor the other unlawful.

Hunter v. Le Conte, 6 Cowen, 728.

In general though a tender is good on the land, yet a personal tender is good off the land.

6 Cowen, 728.

When, by the terms of the lease, rent in kind is payable at a market-place in a market town, as the lessee shall appoint, if no appointment be made, it is the duty of the lessee to seek the lessor to ascertain the place of payment, and then to deliver his rent.

Lush v. Druse, 4 Wend. 313.

A tender of rent takes away the right to distrain, but if after a demand the rent be not paid, the landlord may distrain.

6 Cowen, 728.

Where no place of payment is appointed in the lease, a tender on the land is not good, it must be made to the lessor in person.

Walter v. Dewey, 16 Johns. 222.g

Where a declaration in covenant for rent alleged, that on the 24th June, 1824, a large sum of money, to wit, 21l. 15s., of the rent for three quarters of a year of the term *then* elapsed became due, this was held well; for though strictly the three quarters rent did not become due till the last moment of the 24th June, yet it must be taken to have accrued for the three quarters immediately preceding.

Hennicker v. Turner, 4 Barn. & C. 157.

Reservation of 5l. per acre, during the last 20 years of a term, for every acre of meadow thereby demised which the tenant should plough or convert into tillage during the said last 20 years of the term, and so

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after that rate for any greater or less quantity than an acre, or less time than a year. The rent is due in the last 20 years if the land is then ploughed, whether it was first ploughed within the last 20 years or before; and the rent continues payable during the last 20 years, though the land be again laid down to permanent grass.

Bush v. Stephenson, 3 Taunt. 469.||

β It seems that a lease of premises from the first day of May in one year, to the first day of May in the succeeding year, excludes the first day.

Wilcocks v. Wood, 6 Wend. 346.

By special contract, rent may be payable in advance, and may be dis-
trained for, or it will entitle the landlord to a specific lien against an exe-
cution under the statute.

Peters v. Newkirks, 6 Cowen, 103; Russell v. Doty, 4 Cowen, 576. See Stone v. Knight, 23 Pick. 95; Stone v. Patterson, 19 Pick. 476.*g*

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HERE Littleton's text is to be laid down as a sure rule, that no rent (which is properly said a rent) may be reserved upon any feoffment, gift, or lease, but only to the feoffor, donor, lessor, or to their heirs, and in no manner may it be reserved to any stranger. And the reason of the rule is, because the rent is something paid by way of retribution for the land, and therefore can only be made to him from whom the land passes. Besides, the reservation to a stranger (*a*) was prohibited to *avoid the danger of maintenance*; for if that was allowable, persons might make reservations to powerful men, who might extort more from the tenant than was originally contracted for.

Gillb. on Rents, 54; Lit. § 346; Co. Lit. 47 a, 143 b. || (*a*) If a father, seised in fee, leases, rendering rent to his son, it is void, for the son takes as a purchaser, and is *quasi* a stranger; it should be to the heir of lessor. Hob. 130; and see further, as to reservations, Lord Nottingham's MSS. Co. Lit. 213 b, note (1).||

Hence it is, that the king has been excepted out of the rule, and allowed to make the reservation of the rent to a stranger, because there could be no danger of maintenance in this case, there being no person so great and powerful in the kingdom as the king himself, who parted with the land.

Mod. 162; Co. Lit. 143; 2 Roll. Abr. 447.

But where the king made a lease of a house belonging to his house-keeper of Whitehall, reserving a rent to the housekeeper for the time being; though in this case it was admitted that the king might reserve rent to a stranger, yet it being here made to an officer who was removable at will, the reservation was held ill.

Ld. Raym. 36.

If A enfeoff B upon condition that B and his heirs shall render to C and his heirs a yearly rent of 10s., and if he fail of payment, that it shall be lawful for A and his heirs to re-enter; this is not in nature of any sort of rent, but a sum in gross, which the feoffee is obliged to pay, to prevent the re-entry of the feoffor; for at common law, before the statute of *quia emptores*, it could not be good as a rent-service, because nothing passed from C for which a retribution ought to be made; nor can it be good by way of rent-charge, because C hath no remedy given him by the deed to charge the land with it, or otherwise to recover it; nor is it a rent-seck, because though it should be once paid to C, and he thereby have seisin of

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it, yet he shall never have an assize for the recovery of it, because the penalty by the deed is a re-entry to H and his heirs, which for ever determines it.

Lit. § 345.

But, if A and C in this case had joined in a feoffment of the land by deed, reserving rent to them both and to their heirs, and the feoffee had granted that it should be lawful for them and their heirs to distrain for the rent, this had been a good grant of a rent-charge to them both, because C being party to the deed has a remedy by distress for the recovery of it; and when the feoffee empowers C to distrain on the land, such grant always supposes that the distress, which is in nature of a pledge, shall remain in the person's hands to whom it is given, till it be redeemed by the payment of the thing for which it was originally taken.

Co. Lit. 213.

But, where the husband, possessed of a term for years in his own right, joins with his wife in an assignment of the term, (a) reserving rent to him and his wife, and the survivor of them, if they shall so long live; and if the rent be arrear, that it shall be lawful for them and the survivor of them, and for the assigns of the survivor, to re-enter, but the wife neither sealed nor delivered the deed; this rent determined by the death of the husband, for it could be no good reservation to the wife, because she had no interest in the land to part with, and therefore could have no rent-service reserved to her by way of retribution for a thing she never had in her to part with; nor can this amount to a grant of a rent-charge to her, as in the former case of the feoffment it did to C, because here the wife, having never sealed and delivered the deed, could be no party to it; and there does not appear to have been any clause of distress limited to the wife by this deed, as there was to C by the deed of feoffment, and consequently, it could not be good as a charge upon the land. Nor is it good as a rent-seck in her, because issuing out of the term for years it must, in its nature, be a chattel interest, for which no assize lies, which is the only remedy after seisin for the recovery of the rent-seck. Nor could the executor of the husband be entitled to the rent, though it was limited to them and the survivor of them, and the assigns of the survivor, during the term, because the reservation to the wife was evidently intended to create an interest and right in her to the rent, and therefore shall not be taken as words of limitation against the original design of them.

Cro. Car. 288; Jon. 308; 2 Roll. Abr. 450; Bland v. Inman, 2 Saund. 360. || (a) This would not be a good reservation of a rent-service, by reason of the whole term being assigned and no reversion left. — v. Cooper, 2 Wils. R. 375; Smith v. Mapleback, 1 Term R. 441; Parminter v. Webber, 2 Moo. 656. ||

If a man makes a lease for years, reserving rent to his heirs, or makes a lease to commence after his own death, reserving rent, this is a rent-service arising in the heir, not by way of new purchase of such rent, but as incident to the reversion descending to the heir, and therefore may be released by the ancestor during his life, which it could not be if it were a new purchase in the heir. And so it is, if the rent were reserved upon a lease for life or gift in tail. The reason is, because the reversion descends from the ancestor to such heir, and the rent-service is incident to such reversion, and this may as well be, as a man that hath an estate in land may grant such original charges.

Hob. 130; 2 Roll. Abr. 447; Lit. § 346; and vide Co. Lit. 99 b, 213 a; Hard. 90, 93.

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§ Rent cannot be apportioned between the personal representatives and the heir. *Allen v. Vanhouten*, 4 Harr. (N. J.) R. 47.*g*

But, if the reservation had been made to his son, though he happened afterwards to be heir, such reservation is void; for it cannot be good by way of rent-service, because the son has not the reversion to which the rent is incident at the time of the lease made; and if the son dies before the rent commences, it may go to a different person than the reversion, which belongs to the heir of the father; and such reservation cannot be good by way of new grant, because the word *reservation* will not import a new grant, unless it be made to the person from whom such interest moves.

Hob. 130; *Oates v. Fryth*, 2 Roll. Abr. 447; 2 Sand. 370.

If an original grant be made of a rent, to commence after the death of J S, this is good; for this is not like the case of lands, where the livery must carry the freehold immediately, and where the abeyance, or want of distinguishing where the freehold is, may be of prejudice to the rights of others; for if the freehold was to be granted *in futuro*, a man that had brought his *præcipe* against the grantor, after he had proceeded in it a considerable time, might have his writ abated by the freehold's vesting in a stranger, by reason of a conveyance made by the grantor before the writ brought; but the grant of a rent *de novo* is not attended with this inconvenience, for no man can have a precedent right to a thing which is originally created by the grant itself. Yet *quære* at what distance of time such charges may be allowed to commence, whether it must not be after the lives of the persons *in esse*? for if they be indefinite, they seem to tend to a perpetuity.

Bro. title *Grant*, 86, 8 H. 7, 3; Plow. 156; Palm. 29; 2 Vent. 204.

But a rent *in esse*, or already created, cannot be granted to commence after the death of J S, because to such rents there may be precedent titles, and therefore such grants are not good; for such freeholds, by thus being split and severed, do hide the person in whom the right is, and therefore the party that has right will not be able to discern against whom to bring his *præcipe* for the recovery of it.

Bro. title *Grant*, 86; Plow. 156.

If A covenants and grants with B that he shall have and enjoy Black-acre for six years, and B covenants to pay A, his heirs, executors, and administrators, an annual rent during the term; this, being a good reservation of a rent, shall, upon the death of A, be paid to his heir who has the reversion as a retribution for the profits of the land which he cannot enjoy during the term; and the executors of A shall never have any thing by virtue of the covenant, though it is in express words granted to A and his executors.

Cro. Car. 207, *Drake v. Mundy*.

So, if A makes a lease, reserving rent to him and his executors and assigns, and dies, this rent is determined, for the executors cannot have it for the former reason, being strangers to the reversion, which is an inheritance; and therefore, being never to enjoy the profits of the land after the expiration of the term, can never have a right to a retribution or compensation for them.

Co. Lit. 47; 2 Roll. Abr. 450.

If a bishop leases for years, reserving rent, *provisio quod tempore vaca-*

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tionis dicti episcopatus redditus prædict. secundum ratam temporis solve- tur capitulo ecclesiæ cathedralis dicti episcopatus, with a clause of re-entry to the successor for non-payment of rent to the chapter, this is a void proviso; for the chapter being never to come into the succession of the land belonging to the see, can have no right to a return of service from the lessee.

Mo. 51, Eyer's case; Dyer, 221.

If there be two joint-tenants, and they make a lease by parol or deed-poll, reserving rent to one only, yet it shall inure to both; but, if the lease had been by deed indented, the reservation should have been good to him only to whom it was made, and the other should have taken nothing. The reason of the difference is this,—where the lease is by deed-poll or parol, the rent shall follow the reversion, which is jointly in both lessors; and the rather, because the rent being something in retribution for the land given, the joint tenant to whom it is reserved ought to be seised of it in the same manner he was of the land demised, which was equally for the benefit of his companion as himself; but where the lease is by deed indented, they are estopped to claim the rent in any other manner than it is reserved by the deed, because the indenture is the deed of each party, and no man shall be allowed to recede from or vary his own solemn act.

2 Roll. Abr. 447; Co. Lit. 47; Vent. 161.

β One tenant in common, before distress and avowry, may receive the whole rent and discharge the lessee.

Decker v. Livingston, 15 Johns. 479.

A, styling himself agent of B, signs a lease in his own name to C, without adding the word agent or any other expression denoting an intention to execute it as attorney in fact, and reserving rent, without saying to whom payable; held, that B cannot maintain an action on this contract for the rent against C.

Sheldon v. Dunlap, 1 Har. R. 245.

(H) Of the Continuance of the Rent, and to whom to be paid; and herein of the distinct Interests of the Heir and Executor of the Lessor, and of the Vendor and Vendee.

HERE, first, is observable the difference between a general reservation, without mentioning any person in certain to whom the rent shall be paid, and a particular reservation to the lessor, without mentioning any other person to whom it shall be paid. For where the reservation is general, the rent shall be carried over to the person who should have succeeded to the estate, if no lease had been made; but where the reservation is particular, as to the lessor, without going further, there the rent shall determine with his death, though the lease, upon which it is reserved, be still continuing: as if A makes a lease for years, reserving a certain rent, without saying to the lessor or his heirs, yet this general reservation shall carry the rent not only to the lessor, but even to his heirs that succeed in the reversion, because the rent is reserved as a retribution or compensation for the land demised, and therefore ought, from the nature of the contract, to be of equal duration with the demise. But if A had made a lease, reserving a certain rent to himself, he has thereby determined how long the reservation shall continue, and therefore it shall never be carried further than the period of time the lessor himself has fixed it. (a)

Co. Lit. 47 a; 2 Roll. Abr. 289, 450; Dyer, 45; Hard. 95. || (a) But though this was the opinion of Moyle in 10 Edw. 4, 18 b, (and so is Dyer, 45 a; and Co. Lit.

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47 a.) yet Littleton in the above book was of a different opinion, and said, "I let land to a man for term of years, rendering rent *to me*, without saying, *and to my heirs*; yet, if I die within the term, my heir shall have the rent, *for it is annexed to the reversion which is descended to my heir*," which seems a very sound reason. And as to the distinction that where the reservation is general, not saying to whom, the rent goes to the heir, but where it is to the lessor, or the lessor and his assigns, or the lessor and his executors, it determines by the lessor's death, Willoughby and Jenney, Js., said, "it was a narrow difference" which was adopted by Jones, J., in *Sury v. Brown*, Latch, 101; however, where the words "during the term" are omitted, this distinction seems established. *Bland v. Inman*, Sir W. Jones, 308, where the cases are collected. But where these words "during the term" are inserted, it is settled the rent will be continued during the whole term. *Sacheverell v. Frogate*, 2 Saund. R. 307; and see *Ibid.* 307 b, notes (2), (3), (5th ed.)||

So, if a lease had been made by A, yielding and paying to him and his assigns yearly the rent of 10s.; this rent shall likewise determine by his death, and his heirs shall never have it, because there are no words to carry it to the heir who is to have the reversion; and the lessor having expressly limited it to himself, has thereby determined it to his own life, for his assigns cannot have it longer than the lessor himself should have had it; and these words, *his assigns*, cannot enlarge the reservation; for if he had assigned over the reversion, the rent by his own death had determined; *secus*, if he had reserved it *during the term*.

12 Co. 35; Latch, 274; Co. Lit. 47; Cro. Car. 290; Vent. 162; 2 Lev. 13; Mod. 216. || Vide 2 Will. Saund. 368, n. 2, 3; and note above.||

So, if the reservation had been made to the lessor and his executors, or to him, his executors and assigns; in these cases, the rent determines with the life of the lessor, because the executor cannot take the rent; for that if it be continued beyond the life of the lessor, it must be carried over to him who is to succeed in the estate, and that is the heir at law; but the heir cannot take in these cases, because there are no words in the deed to carry it to him.

2 Roll. Abr. 450; Co. Lit. 47.

If A makes a lease reserving rent to him *or* his heirs, this is a good reservation during the life of A, but void as to his heirs,^(a) because the reservation being to him *or* his heirs in the disjunctive, both cannot take it; and the word *heirs* cannot be words of limitation, because if they are to take at all they must take originally; for if the rent vests in the lessor, it cannot afterwards go to the heirs, for that would be contrary to the words of the reservation, which limited the rent either to the lessor *or* his heirs, but not to both of them.

Co. Lit. 214; 5 Co. 112; Vent. 163. ||(a) But is good if reserved "*during the term*." 5 Co. 111 b.||

But it hath been adjudged, that where an abbot made a lease, rendering rent to him or his successor during the term, that this reservation was good to the successor after the death of the lessor, because here the rent by express words is made payable *during the continuance of the term*, and therefore as an incident to the reversion must go in succession with the inheritance; and therefore the successor of the abbot or assignee of the reversion must necessarily have it; for the rent being but a retribution for the land, none can have a right to it but those who would have succeeded in the estate, if the land for which the retribution is given had never been leased.

5 Co. 111, Mallory's case; Cro. Eliz. 805, 832; Vent. 146, 163.

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If tenant in special tail leases for years, reserving rent to him, his heirs and assigns, this rent shall go with the reversion to the special heir in tail, though it be reserved to the heirs generally; for the word *heir* shall be taken in that sense that will best answer the nature of the contract, which is, that those who would have succeeded in the estate, if the lease had never been made, shall enjoy the rent, which is the retribution given for the want of the land during the lease.

Hard. 89; Vent. 163; || Co. Lit. 213 b, note 1; 1 Vent. 162, where Ld. Hale says, the law uses all industry imaginable to conform the reservation to the estate. 2 Saund. 372.||

If there be tenant for life with several remainders over, so settled by limitation of uses, with a power to tenant for life to make leases, who makes a lease, reserving rent to him, his heirs and assigns; this is a good reservation, and shall go to those in remainder: for when the tenant for life makes a lease, pursuant to such power given to him by the settlement, such lessee derives his estate out of the inheritance, which before the settlement was in the tenant for life; and the settlement being by construction of law subsequent to the estate of the lessee, those in remainder to the tenant for life are his assignees, to whom the rent by the express words of the lease is reserved and limited after the death of the tenant for life.

8 Co. 69, Whitlock's case; 1 Anders. 273; Co. Lit. 214, n. 1, 17th edit.

So, if the reservation had been in this case to the lessor, and every person to whom the reversion and inheritance of the land belongs during the term, this would be a good reservation to those in remainder, and the law would, in such case, distribute the rent according to the several interests under the settlement. But my Lord Coke says, the surest way is for the tenant for life to reserve the rent annually *during the term*, and then the law disposes of it as an incident to the reversion.

8 Co. 71.

If a man seised of land on the part of his mother, makes a lease or a gift in tail, reserving rent to him and his heirs, this rent shall go with the reversion to the heirs on the part of the mother, because the nature of the contract is such, that the retribution should go to those who lose the profit of the land during the gift or lease.

Co. Lit. 12.

But if he had made a feoffment in fee, reserving rent to him and his heirs, the rent would go to the heir on the part of the father, because here is an entire disposition of the land, and the rent is in nature of a new purchase coming into the family from the grant of the feoffee, and therefore the blood of the father shall be preferred.

Co. Lit. 12.

If a man possessed of a term for one hundred years makes a lease for fifty years, reserving rent to him and his heirs, this rent determines with his death; for the heir cannot have it, because he cannot succeed in the estate, (being a chattel interest,) to which the rent, if it continues after the death of the lessor, must belong; and the executors cannot have it, because there are no words to carry it to them.(a)

Vent. 161. (a) Vide *infra*. || But the words "during the term," would carry the rent to the executors. 1 Vent. 162.||

But if a man, seised of land in fee, makes a lease for years, reserving rent to him and his assigns *during the term*, this reservation shall not

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determine by the death of the lessor, but the rent shall go to his heir; for though there be no mention of the heirs in the reservation, yet there are words that evidently declare the intention of the lessor, that the payment of the rent shall be of equal duration with the lease, the lessor having expressly provided that it shall be paid during the term, and, consequently, the rent must be carried over to the heir, who comes into the inheritance after the death of the lessor, and would have succeeded in the possession of the estate, if no lease had been made. And if the lessor assigns over his reversion, the assignee shall have the rent as incident to it, because the rent is to continue during the term, and therefore must follow the reversion, since the lessor made no particular disposition of it separate from the reversion.

Latch, 99, 100; *Sury v. Brown*, Vent. 163; and vide 2 Roll. Abr. 451.

β A leased to B a farm for three years, and afterwards devised the same to his son C, for and during his natural life, from and after the expiration of the present lease thereon; held, that the rents accruing between the testator's death and the expiration of the lease, belong to the heir of the testator.

Ware v. Hall, 1 Har. (N. J.) R. 333.

Rent cannot be apportioned between the personal representative and the heir.

Allen v. Van Houten, 4 Har. (N. J.) R. 47.

The rents and profits of real estate of one who has died insolvent belong to the heirs and not to the executors and administrators, until such real estate be sold for the debts of the insolvent or by order of a competent court.

McCoy v. Scott, 2 Rawle, 222; *Adams v. Adams*, 4 Watts, 160; 1 Miles, 220. See *vide* 1 Root, 182. See *Goodrich v. Thompson*, 4 Day, 215; *Gibson v. Farley*, 16 Mass. 280; *Trent v. Trent*, Gilm. 174; *Harrison v. Wood*, 1 Dev. & Batt. 439; *antè*, vol. iv. pp. 81, 84, 631.*g*

If a lease be made for years, reserving rent during the term to the lessor, his executors and assigns, this, by the judgment of *Richmond and Butcher's case*, determines upon the death of the lessor, and does not go to the heir. But this judgment hath been since overthrown by the authority of the case of (*a*) *Sacheverell v. Frogate*, because the reservation being to the lessor and his assigns *during the term*, (for the words *executors* and *administrators* are void, the lessor having the inheritance,) such express words evidently discover the intent of the contract, and that the lessee agreed and bound himself to the payment of the rent during the continuance of the demise.

5 Co. 112; *Cro. Eliz.* 217. (*a*) 2 Saund. 367; 2 Lev. 13; *Raym.* 213; Vent. 161, *Sacheverell v. Frogate*.

So, and for the same reason, if a termor for fifty years leases for twenty-five years, reserving rent to him and his heirs *during the term*, the executors shall have the rent after the death of the lessor.

Vent. 162.

If A grants a rent-charge to B for forty years, with a clause of distress to B and his heirs during the term, the executor of B may distrain for it during the term; for the distress is expressly given during the term, and therefore must belong to the executor who has a right to the rent-charge, being a chattel interest.

Cro. Car. 644, *Darrel v. Wilson*.

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A, tenant for three lives to him and his heirs, assigned over his whole estate to B and his heirs, reserving a rent of 10*l.* a year to the assignor, his executors, administrators and assigns, with a proviso, that upon non-payment the assignor and his heirs might re-enter, and the assignee covenanted to pay the rent to A, his executors and administrators: the question was, Whether this rent should go to the heir or executor of the assignor? And it was decreed in equity that it should go to the executor, as the rent was reserved to him, and as there was no reversion (*a*) left in the assignor to which the rent could be incident, so as to carry it to the heir. It was also held, that the covenant to pay the rent to the executor and administrator of the assignor was good and binding both in law and equity; and though the proviso was, that in case of non-payment of the rent, the assignor and his heirs might re-enter, yet the court thought this immaterial, as in equity the heir, in this case, must be looked upon as a trustee for the executor.

1 P. Wms. 555, Sir Matth. Jennison v. Lord Lexington. ||(*a*) This rent could not be distrained for, by reason of the assignor having no reversion. 2 Wils. 375; 2 B. Moo. 656.||

If a lease be made, reserving rent at Michaelmas, or ten days after; the rent be not paid at Michaelmas, and, before the ten days are expired, the lessor die; the heir, and not the executor, shall have the rent; for though it was in the election of the lessee to pay the rent at Michaelmas, yet the ten days after are the true legal term, so that the rent was not legally due before that time, and therefore no chattel. So, if the lessor die on the day on which the rent is to be paid, after sunset, and before midnight, the heir, and not the executor, shall have the rent; for it is not due till the utmost limit of the day, which ends not till twelve o'clock, though the time for demanding it for conveniency be a convenient time before the sun sets.(*b*)

10 Co. 127, Clun's case; Cro. Ja. 309; Cro. Eliz. 575; Mo. pl. 1012; Yelv. 167; Saund. 287; [2 Bl. Rep. 1077;] ||Norris v. Harrison, 2 Madd. 268, *acc.*|| (*b*) Vide *post*.

A, pursuant to a power in his marriage-settlement, made leases of several parts of his estate which were settled on his wife, reserving rent payable at Lady-day and Michaelmas, and died upon Michaelmas-day between three and four in the afternoon, and before sunset, leaving B his executor: one of the tenants paid A his rent, being 18*l.*, the morning of the day on which he died; and the question was, as to the arrears due from all the tenants, whether they should go to the jointress as incident to the reversion, or to B the executor? and it was decreed by the Master of the Rolls, on the authority of Clun's case, that they should go to the jointress, being incident to the reversion, to which the heir would be entitled in case there had been no jointress; but that as to the 18*l.* rent paid by one of the tenants to the lessor upon Michaelmas-day in the morning on which the lessor died, his Honour held this to be a good payment as to the lessee who paid it, and that he should not be compelled to pay it over again, but that B the executor, to whose hands it came, should pay and account for it to the jointress.(*c*)

Lord Rockingham v. Penrice, 1 P. Wms. 177; 2 Salk. 578, S. C. ||(*c*) As the case is here stated, it seems *contra* to what is laid down in Clun's case, 10 Co. 127 b; that if the tenant pay the rent in the morning of the day when it becomes due, and the lessor dies at two hours before noon, it is a good payment against the heir, though voluntary; but it appears from Lib. Reg. a, 1711, fo. 341, 1 Swanst. R. 346, that in

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the case in the text, the tenant paid the rent, not on the morning of Michaelmas-day, but on the 21st September previous; and see 2 Madd. 268.]

But where A granted a rent-charge to B for life, payable at Lady-day and Michaelmas, and B died on Michaelmas-day after sunset; it was held by Judge Tracy, at Durham assizes, that as B lived till after sunset, which was the legal time for demanding the rent, though he died before twelve at night, that it should go to the executors.

1 P. Wms. 178, *Cole v. Bellasis*.—From a note of Justice Tracy, who said he had consulted the Chief Justice Holt on the point, and that upon consideration of all the cases he was of the same opinion.

A, tenant for life, remainder to his wife for life, &c., makes a lease at will, reserving rent at Lady-day and Michaelmas, and died on Michaelmas-day about twelve o'clock at noon: it was held in this case, that his administrator was entitled to this rent. And herein the court took a difference betwixt a rent incident to a reversion that must go somewhere, (if not to the executor, then to the heir,) and where the rent was to go nowhere, unless to the executor; that in the latter case, if the lessor lived to the beginning of that day, at which time the voluntary payment of the rent might be made, this would be sufficient to entitle the executor or administrator to the rent, rather than it should be lost; for it would be strange if the tenant should pay the rent to nobody; and in this case the person in remainder (*viz.* the wife) can have no pretence to the rent, it being a lease at will, and, consequently, such as could have no continuance with respect to her.

Preced. Chan. 555; *Earl of Strafford v. Lady Wentworth*, 1 P. Wms. 180, S. C. cited. [See the report of this case, 9 Mod. 21, which differs from those in the above books; and see the decree stated from the Register, 1 Swanst. 345, *notè* and Mr. Swanston's observations.]

A, tenant for life, remainder to B his son in tail, A being in debt, and his estate extended, the creditor made a lease to J S, reserving 160*l.* a year, payable quarterly; A died the 10th of March, and J S continued the possession till after the Lady-day next following; whereupon B claimed the whole rent from Christmas to Lady-day; but the court held, that as to the rent from Christmas to the 10th of March it was a gift in law to the tenant, not provided against by any of the acts of parliament; and that there could be no remedy as to any apportionment in point of (a) time either in law or equity.

1 P. Wms. 392, *Jenner v. Morgan*. (a) Salk. 65, pl. 1; {8 Ves. J., 311.}

But now by the 11 Geo. 2, cap. 19, § 15, "Where any tenant for life shall die before or on the day on which any rent was reserved, upon any demise which determined on the death of such tenant for life, the executors or administrators of such tenant for life may, in an action on the case, recover of the under-tenants, if such tenant for life die on the day on which the same was made payable, the whole; or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter, or other time in which the said rent was growing due, making all just allowances."

[This statute does not apply to apportionment of quit-rents, &c., as between a tenant for life and a remainder-man. 10 Ves. 66. In order that the rent may be apportionable under the statute, the demise must *determine* by the death of the tenant for life. If the lease be good, so as to bind the remainder-man, then the whole rent goes to the remainder-man, and there is no apportionment. Vide *Ex parte Smyth*,

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1 Swanst. R. 337; and the cases collected in note.—*Qu.* Whether the statute extends to tenants *pur autur vie*, who are clearly within the mischief of the act? but the words seem to apply only to tenants for their own lives. Vide 3 Taunt. 330.||

[Where a tenant in tail granted a lease not warranted by the statute, and died without issue a week before the day of payment of the half-year's rent, and the lessee afterwards paid all that half-year's rent to the remainder-man, Lord Hardwicke held the executors of the tenant in tail entitled to the rent to the day of his death; for as the lessee had submitted to pay it, but had paid it to one who had no right to it, the person to whom it was so paid should be accountable, and considered as receiving it to the use of those who were in equity entitled to it.(a)]

Paget v. Gee, 1 Burn's Just. tit. *Distress*, § 17; Ambl. 198; {8 Ves. J. 308, Hawkins v. Kelly; S. P. in the case of a tenant for life. And assumpsit for money had and received will lie. Whitfield v. Pindar, cited 8 Ves. J. 311, 312;} [1 Burn's Just. Append. 807, (2d ed.) (a) The judgment of Lord Hardwicke, in this case, has been much animadverted on by a deceased author. Evans' Stat. vol. iv. p. 176, n. (1), (2d edit.) Lord H. expressly founded his judgment on the reason stated in the text, viz., the actual payment to the remainder-man, who was clearly not entitled to the rent; but he also intimated a strong opinion that tenant in tail was within the operation of the 11 G. 2, c. 19, § 15; which opinion appears confirmed by a decision of the court of C. P. in Whitfield v. Pindar, 1781, cited 2 Bro. C. C. 661; 8 Ves. 311, and by the remarks of Lord Eldon in the latter book. But the writer in question, who admits that the words of the statute ought to be understood as extending generally to all tenants *whose interest determines with their life*, objects to Lord Hardwicke throwing out that, although courts of law might consider themselves bound to construe the statute with literal strictness, yet a court of equity might hold it to extend to cases analogous to those named in its language. It is not very clear whether the author objects to Lord H.'s language, as asserting that a different rule of construction of a statute might be adopted in equity from that established at law; or whether his objection lies generally against the doctrine that judicial construction may enlarge a statute, and extend it to cases within its equity. Certainly it is the duty of every court of justice, whether a court of law or equity, to consult the *intention* of the legislature. 10 Rep. 57 b. Nor does it anywhere appear, that, in discharge of this duty, courts of equity are invested with a larger or more liberal discretion than courts of law. Fonbl. on Equity, p. 24, (5th ed.) "Yet though a court of equity will not differ from courts of law in the *exposition* of statutes, yet does it often vary in the *remedies* given, and in the manner of applying them." Per Lord Talbot, Forrester, 39, 40. See instances of this as to the statutes of usury, of frauds, and the register act, Fonbl. on Equity, p. 25; and as to the statutes of forcible entry, Ambl. 811, App. Hughes v. Morden, 1 Ves. 188; and see per Sir Joseph Jekyll, M. R., 2 P. Will. 753, and 1 Black. R. 123. As Lord Hardwicke's language in the case above seems to intimate that a court of equity might hold tenant in tail within the statute, though courts of law held otherwise, it perhaps goes beyond the line adopted in equity as to the *exposition* of statutes. With respect to the general doctrine, that judges may enlarge the words of statutes to extend them according to their equity, it is very ancient, and has been in repeated instances applied to various statutes. See Lit. § 21; Plowden, 9, 10, 17, 18, 36, 46, 53, 57, 59, 82, 88, 109, 124, 177, 204, 244, 363, 364, 366, 371, 464, 466; Vin. Abr. tit. *Statutes*, E. 6; Hatt. Treat. on Stat. Ash. Exposit. of Stat.; Com. Dig. Parliament, R. 10, 13, &c.; and *post*, tit. *Statute*. It was, however, well observed by Richardson, (*arguendo*.) 4 Manl. & S. 118, that such construction by equity might well obtain formerly, when the legislature was used to express its intention sparingly, in a few words or sentences only, but in modern times, since it was the practice to express the intention fully and at large, such construction was unnecessary and dangerous. And Lord Tenterden, C. J., in a late case said, "there was always danger in giving effect to what is called the equity of a statute," 6 Barn. & C. 475; and the Court, in that case, refused so to extend the 8 Ann. c. 14, § 1. See *post*, tit. *Statute*. Sir W. Evans also impugns, as inaccurate in reasoning, the particular ground on which Lord H. cautiously founded his judgment, viz., the fact of the tenant having submitted to pay the rent to the remainder-man. But that judgment rested upon the established principle so often acted upon, both at law and equity, that where a party has got money into his hands which in equity and conscience belongs to

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another, he is bound to pay it to him, notwithstanding that such other person might have been without remedy to recover it, had the original payer refused it.||

Where tenants from year to year under demises from a testamentary guardian of an infant tenant in tail, who died without issue between the days of payment, had paid the whole of the rent to receivers, Lord Thurlow directed such part of it as had accrued due in the lifetime of the tenant in tail to be paid to his personal representative, for that the tenant's holding from year to year, or from period to period, from a guardian without lease or covenant, could not be allowed to raise an implication in their own favour that they should hold without paying rent to anybody. These two cases were decided independently on the statute of 11 G. 2, though Lord Hardwicke strongly inclined to think that a tenant in tail was {} within it: a tenant in tail after possibility of issue extinct, and a tenant for years determinable upon lives, he thought, were clearly within it.

Vernon v. Vernon, 2 Br. Ch. Rep. 659. {} {} 8 Ves. J., 311, and Whitfield v. Pindar, there cited, *accord.* }

|| So where an incumbent had leased the glebe and tithes of his living for a term of years, and the lease expired by his death, and the tenant paid a whole year's rent to the successor, the executors of the last incumbent were held entitled to an apportionment of the rent up to the time of his death.

Hawkins v. Kelly, 8 Ves. 308.

The above cases involve the question, whether or not *any* apportionment is to take place; other cases have also occurred, as to the *measure* of apportionment, where *some* apportionment is clearly to be made.

Thus, where a vicar had made a composition with his parishioners for tithes, payable on the 29th September, and the Easter offerings were payable on the 10th April; and the vicar, having received the composition up to the 29th September, 1802, died, on the 10th March, 1803, and the new incumbent had received Easter offerings up to April, 1803, and compositions up to 29th September, 1803, some according to the old agreement, and others according to new ones; it was held that the composition ceased at the death of the vicar, and that his representatives were not entitled to a proportion of the old composition up to his death, but only to the value of any tithes in kind accruing between the 29th September, 1802, and the time of his death. The court distinguished this case from cases of rent due for land, because there every day's occupation was valuable to the tenant, and therefore there the apportionment might well be according to the time of occupation. But in a subsequent case, where a bill was filed by the executrix of a rector against his successor for a proportion of the compositions received by him, the rector having died on the 6th May, and the compositions being due at Michaelmas, the question was, whether the apportionment was to be made according to the time of the rector's incumbency in the year, or according to the value of the tithes accruing in his time; the Vice-Chancellor held, in opposition to the case of Williams v. Powell, that the time was to be the measure of apportionment, and that there was no substantial distinction between the profits of land and tithes, since every day yields some tithable matter, either personal, predial, or mixed.

William's v. Powell, 10 East, 268; Aynsley v. Wordsworth, 2 Ves. & B. 331.||

Where money to be laid out in the purchase of land is vested in government securities, and the interest and dividends are directed to go in the

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mean time as the land would, in that case if the tenant for life die between the days of payment of the half-yearly dividends, his executors are not entitled to a proportional share thereof to the time of his death, but the remainder-man takes the whole.

Sherrard v. Sherrard, 3 Atk. 502; *Wilson v. Harman*, 2 Ves. 672; *Ambl.* 279; *Rashleigh v. Masters*, 3 Bro. Ch. Rep. 99; *Pearly v. Smith*, 3 Atk. 260. In this last case, the money had been originally secured by mortgage, but by order of the court had been transferred to government securities.] [But interest on bond or mortgage accrues *de die in diem*, for forbearance of the principal, and is therefore apportionable; and its being expressly payable half-yearly makes no difference. 13 Ves. 135; and vide 11 Ves. 361.]

{ An annuity is not within this statute: and shall not be apportioned in favour of the executor of the annuitant.

12 Ves. J. 484, *Franks. v. Noble*.}

¶ Where land was let for years, reserving a certain portion of the grain which should be yearly raised, and the landlord sold and conveyed the land; held, that the purchaser was entitled to the landlord's share at the time of the sale.

Johnson v. Smith, 3 Pennsylv. R. 496.g

(I) Of the Recovery and Demand of the Rent; And herein,

1. In what Cases a demand is necessary.

HERE the material difference is between a remedy by re-entry, and a remedy by distress, for the non-payment of the rent; for where the remedy is by way of re-entry for non-payment, there must be an actual demand made previous to the entry,(a) otherwise it is tortious; because such condition of re-entry is in derogation of the grant, and the estate at law being once defeated is not to be restored by any subsequent payment; and it is presumed that the tenant is there residing on the premises in order to pay the rent for the preservation of his estate, unless the contrary appears by the lessor's being there to demand it; and therefore unless there be a demand made, and the tenant thereby, contrary to the presumption, appears not to be on the land ready to pay the rent, the law will not give the lessor the benefit of re-entry, to defeat the tenant's estate, without a {} wilful default in him; which cannot appear without a demand hath been actually made on the land.

Co. Lit. 201 b; *Hob.* 207, 371; 5 *Co.* 56; *Dyer*, 51; *Plow.* 70; 7 *Co.* 56; *Maund's case*, *Vaugh.* 32. [Gilbert on Rents, 73. {Wilkes, 500, 506. {} If the demand is made by an agent, he must be clothed with proper authority to make it, and must notify it to the tenant. But if he has a power of attorney for the purpose, of which he informs the tenant, and has it ready to produce, it is sufficient, though he does not produce it at the time of demand; the tenant being satisfied without it. 7 *East*. 363, *Roe v. Davis*.} (a) By special consent of the parties, a re-entry may be for default of payment of rent, without a demand. 5 *Rep.* 40 b; *Doe v. Masters*, 2 *Barn. & C.* 490.j]

So, if a *nomine pænæ* be given to the lessor for non-payment, the lessor must demand the rent before he can be entitled to the penalty; or, if the clause be, that if the rent be behind, that the estate of the lessee shall cease and be void; in these cases, there must be an actual demand made, because the presumption is, that the lessee is attendant on the land to save his penalty and preserve his estate, and therefore shall not be punished without a wilful default; and that cannot be made appear without a demand be proved, and that it was not answered. And the demand in

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these cases must be made at the day prefixed for the payment, alleged expressly to have been made in the pleading.

Hut. 114; Hob. 207, 331; 5 Co. 56.

But, where the remedy for the recovery of the rent is by distress, there needs no demand previous to the distress; though the deed says, that if the rent be behind, being lawfully demanded, the lessor may distrain; but the lessor, notwithstanding such clause, may distrain when the rent becomes due. So it is, if a rent-charge be granted to A, and if it be behind, being lawfully demanded, that then A shall distrain: he may distrain without any previous demand, because this remedy is not in destruction of the estate, for the distress is only a pledge for the payment of it, and the very taking of the distress is a legal demand of the tenant to pay the rent, which was all that was required by the deed; and the tenant is not injured by the taking of the distress, because, upon the tender of the rent, the pledges are immediately to be restored, or a writ of *detinue* lies after the *quantum* of the rent has been settled in a replevin: whereas in the case of re-entry, or of the penalty, the tenant is really injured either by the loss of his estate, or the payment of a greater sum than the rent, which cannot be restored upon the payment of the rent; and therefore he shall not be punished in such cases without a wilful default in him, which cannot otherwise appear than by the proof of a demand, which was not answered by the tenant.

Hob. 207; Hutt. 13, 25; Moor: 883; 2 Roll. Abr. 426. {Willes 500, 506.}

But this general distinction must be understood with these restrictions:—

First, That if the king makes a lease, reserving rent with a clause of re-entry for non-payment, he is not obliged to make any demand previous to his re-entry, but the tenant is obliged to pay his rent for the preservation of his estate, because it is beneath the king to attend his subject to demand his rent.

5 Co. 56; 4 Co. 73; Latch, 28; Moor. 152; Dyer, 87, 88. [If lands of a subject, whereon rent is reserved, with a condition of re-entry, come to the king, he may, by reason of his prerogative, take advantage of the condition without demand, though the subject could not. 5 Co. 56 a, b.]

But this exception is not to be extended to the duchy lands, though they be in the hands of the king, for the king must make a demand before he can re-enter into such lands: but this is by the 1 H. 4, which provides that, when the duchy lands come to the king, they shall not be under such government and regulations as the demesnes and possessions belonging to the crown.

Moor, 149, 160, Bouny's case.

So, if a prebendary make a lease, rendering rent, and if the rent be arrear and be demanded, that it shall be lawful for the prebendary to re-enter; if the reversion in this case come to the king, the king must in this case demand the rent, though he shall be by his prerogative excused of an implied demand; for the implied demand is the act of the law, the other the express agreement of the parties, which the king's prerogative shall not defeat; therefore in case of the king, if he make a lease, reserving rent, with a proviso, that if the rent be in arrear for such a time (being lawfully demanded, or demanded in due form,) that then the lease shall be void; it seems, that not only the patentee of the reversion in this case, but also the king himself, whilst he continues the reversion in his own hands, is obliged

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to make an actual demand by reason of the express agreement for that purpose.

Dyer, 87, 210.

But if the king, in cases where he need not make a demand, assigns over the reversion, the patentee cannot enter for non-payment, without a previous demand, because the privilege is inseparably annexed to the person of the king.

4 Co. 73; *Moor*, 404; *Cro. Eliz.* 462; *Dyer*, 87.

Secondly, Another exception is, where the rent is payable at a place off the land, with a clause, that if the rent be behind, being lawfully demanded at the place off the land; or with a clause, that if the rent be behind, being lawfully demanded of the person that is to pay it, that then he may distrain; in these cases, though the remedy be by distress only, yet the grantee cannot distrain without a previous demand; because here the distress and demand being not one complicate, but different acts, to be performed at different places and times, the demand must be previous to the distress; for the distress is a matter of agreement between the parties, not of common right, and therefore must be used in the manner that it is given.

Hob. 208; 2 *Roll. Abr.* 426; *Moor*, 883; *Brownl.* 171; and *vide Hutt.* 23, *cont.*

But where the clause is no more, than that if the rents be behind, being lawfully demanded, (without saying at any place off the land, or of the person of the grantor,) that then the grantee may distrain, there needs no actual demand, because here the distress and demand is but one complicate act, the one included in the other, and all done at one time and place, viz., upon the land; for the distress is in itself a lawful demand, and therefore there needs no actual demand previous to it; because all that was required by the deed was a lawful demand, which the distress in its own nature is.

2 *Roll. Abr.* 426; *Hob.* 208; and *vide Dyer*, 348.

And there seems to have been formerly another exception admitted, that where the remedy was by way of entry for non-payment, that yet there needed no demand, if the rent were made payable at any place off the land; because they looked upon the money payable off the land to be in nature of a sum in gross, which the tenant had at his own peril undertaken to pay. But this opinion has been entirely exploded, for the place of payment does not change or alter the nature of the service, but it remains in its nature a rent, as much as if it had been made payable upon the land; and therefore the presumption is, that the tenant was there to pay it, unless it be overthrown by the proof of a demand, and without such demand, and a neglect and refusal thereupon, there is no injury to the lessor, and, consequently, the estate of the lessee ought not to be defeated.

Plow. 70; 4 Co. 73; *Moor*, 408, 598; *Cro. Eliz.* 415, 435, 536.

But when the power of re-entry is given to the lessor for non-payment, without any further demand, there, it seems, that the lessee has undertaken to pay it, whether it be demanded or not; and there can be no presumption in his favour in this case; because, by dispensing with the demand, he has put himself under the necessity of making an actual proof that he was ready to tender and pay the rent.

Dyer, 68.

There is another exception when the remedy is by distress, and that is,

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when the tenant was ready on the land to pay the rent at the day, and made a tender of it; there, it seems, there must be a demand previous to the distress, because where the tenant has shown himself ready on the day by the tender, he has done all that in reason can be required of him; for it would put the tenant to endless trouble to oblige him every day to make a tender; it being altogether uncertain when the lessor will come for his rent, when he has omitted to receive it the day which he himself has appointed by the lease for payment and receipt; wherefore as the lessee must expect the lessor, and be ready to pay it at the day appointed for the payment of it, else the lessor may distrain for it without any demand; so, where the lessor has lapsed the day of payment, and was not on the land to receive it, he must give the tenant notice to pay it before he can distrain for it; for the tenant shall be put to no trouble where it appears that he has omitted nothing on his part.

Hob. 207; 2 Roll. Abr. 427.

And where the tender is made by the tenant on the land at the day, there a demand on the land is sufficient to justify a distress after the day; because the demand in such case is of equal notoriety with the tender, and by a parity of reason the tenant ought to take notice of such demand, as well as the lessor of the tender on the land.

Hob. 207.

But, if the tenant had tendered the rent on the day to the person of the lessor, and he refused, it seems, by the better opinion, that the lessor cannot distrain for that rent, without a demand of the person of the tenant; because the demand ought to be equally notorious to the tenant, as the tender was to the lessor.

Hob. 207; 2 Roll. Abr. 427.

So, if the services by which the tenant holds be personal, as homage, fealty, &c., the demand must be of the person of the tenant, because this service is only performable by the very person of the tenant; and therefore a demand, where he is not, would be improper.

Hutt. 13; Hob. 207.

Again, if the rent be seck, and the tenant be ready at the last instant of the day of payment to pay the rent, and the grantor be not there to receive it, he must afterwards demand it of the person of the tenant on the lands before he can have his assize; because the tenant, by the tender at the day, has done all that was required on his part; and if the grantee might have his assize, after such tender on the day, without a demand of the person, the tenant might be made a disseisor, and damages for the disseisin laid upon him, without any wilful default in him. But, in the case of a rent-charge, after such tender of the tenant on the land, the grantee may afterwards demand the rent on the land, because he has his remedy by distress, which is no more than a pledge for the rent, and this being to be found, and taken on the land, the grantee need only demand his rent, where he can find his remedy, which is on the land. But in this case, if the grantee cannot find the tenant on the land to demand the rent, he may, on the next feast on which the rent is payable, demand all the arrears on the land; and if the tenant is not there to pay it, he has failed of his duty, and is guilty of a wilful default, which amounts to a denial; and that denial being a disseisin of the rent, the grantee may have his assize, and by that shall recover all the arrears.

Cro. Car. 508; 7 Co. 29 a; Hob. 207; 2 Roll. Abr. 427.

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But, if there has been neither a tender of the rent, nor a demand of the grantee, on the day, there, the grantee may afterwards demand the rent on the land, because the tenant having omitted to do his duty by a tender on the day, he is still obliged to answer the legal demand of the grantee, which is well made upon the land, because the rent issues thereout; for where there is no tender on the day of payment, the rent is due and payable every day afterwards; and therefore a demand in the same manner as the law requires is sufficient; and, consequently, the non-payment, after a demand on the land, is a denial and disseisin, for which the grantee may have his assize.

Lit. § 233; 7 Co. 29; 2 Roll. Abr. 427.

If a lease be made reserving rent, and a bond given for performance of covenants and payment of the rent, the lessor may sue the bond without demanding the rent; for the bond being only a collateral security for the rent, makes no alteration in the nature of it; but it must still be paid in the same manner, and at the same time and place, as if there had been no bond given; and therefore is subject to the former rules and distinctions as to the demand.

Cro. Eliz. 332; Cro. Car. 76; Hob. 8. ¶Analagous to this is the decision in *Murray v. King*, 5 Barn. and A. 165.¶

If there be several things demised in one lease, with several reservations, with a clause, that if the several yearly rents reserved be behind or unpaid in part, or in all, by the space of one month after any of the days on which the same ought to be paid, that then it shall be lawful for the lessor, into such of the premises whereupon such rents being behind are reserved, to re-enter; these are in the nature of distinct demises and several reservations; and, consequently, there must be distinct demands on each demise to defeat the whole estate demised.

Vaugh. 71, 72.

Also, as to the necessity of a demand of the rents, there is a difference between a condition and a limitation. For instance, if tenant for life (as the case was by marriage-settlement with power to make leases for twenty-one years, so long as the lessee, his executors or assigns, shall duly pay the rent reserved) makes a lease pursuant to the power, the tenant is at his peril obliged to pay the rent without any demand of the lessor; because the estate is limited to continue only so long as the rent is paid; and therefore, for the non-performance, according to the limitation, the estate must determine; as if an estate be made to a woman *dum sola fuerit*, this is a word of limitation which determines her estate upon her marriage.

Vaugh. 31, 32; *Tristram v. Countess of Baltinglass*.

Note.—It seems the better way for the lessor to have a clause of re-entry for non-payment of the rent, than a clause that the lease shall be void for non-payment; because, in the case of a re-entry, a demand by the lessor and non-payment by the lessee does not avoid the lease; because there must be an actual entry to determine it, to which, as it is said, there must be an actual demand precedent; so that in this case an actual demand does not determine the lease, but only puts it into the power of the lessor to avoid it; and this being discretionary in the lessor, he may either recover the rent by action of debt, and so suffer the lease to continue; or after such actual demand he may by entry defeat it. But if the clause be, that for non-payment the lease shall be void, then, if the lessor should unadvisedly make an actual demand of the rent, and the lessee not be able at that time to pay it, he has hereby actually determined the lease; because there is no re-entry previous

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to determine an estate already void in itself: yet, even in this case, if the lessor forbears to make an actual demand when the rent is in arrear, he may recover it by action of debt or distress, and so continue the lease, because, these remedies being not in defeasance of the grant, the lessor may pursue them without an actual demand. But this observation is to be intended only of a lease for *years*; for in case of a lease for *life* no demand can determine it without actual entry, though the clause be, that for non-payment of the rent the lease shall cease and be void.^(a)

Hob. 331; 2 Roll. Abr. 429; 2 Mod. 264; 3 Co. 64; Pennant's case. [¶](a) For it is a rule that where an estate commences by livery it cannot be determined before entry. Plowd. 135, 136; 1 Saund. R. 287 c. Therefore if the lessor after notice of the forfeiture, which is a material and issuable fact, (Pennant's Ca. *ubi sup.* 2 Term R. 430, 431,) accepts rent which accrued due after, or does any other act amounting to a dispensation of the forfeiture, the lease which was before *voidable* is affirmed. But if there be a lease for *years*, with a condition that for non-payment of rent or the like, the lease shall be *null and void*; if the lessor makes a legal demand of the rent, and the lessee neglects or refuses to pay, or if the lessee is guilty of any other breach of the condition of re-entry, the lease is absolutely determined, and cannot be set up again by acceptance of rent due after the breach of the condition, or by any other act. Goodright v. Davids, Cowp. 804; Co. Lit. 215 a; 1 Saund. R. 287 d. However, where the words of the proviso were, that "the lease should be null and void to all intents and purposes," on a certain default by the lessee; it was held, that the true construction was, that it was only *voidable*, at the option of the lessor; for the court would not permit the lessee to take advantage of his own wrong. Doe v. Banks, 4 Barn. & A. 401; and see Rede v. Farr, 6 Maul. & S. 121; Arnsby v. Woodward, 6 Barn. & C. 519; and a receipt of rent by the lessor in these cases after the forfeiture was held a waiver.[¶]

One makes a lease for years, rendering rent, payable at the two most usual feasts in the year, or within a month after each of the said feasts, at such a place certain, with a proviso, that if the rent be arrear by the space of a month after either of the said days, (being demanded in due form,) that then the lease shall be void. If the lessee does not pay the rent at the feast-day, but some time after within the month makes a tender of it at the place appointed, it is doubted if this be sufficient without a tender at the last instant of the last day of the month; but it seems not, because the lessor might have been there on the last instant of that day to have demanded it, and then for non-payment the lease will be void, and, consequently, such tender before the last instant cannot save it.

Dyer, 87, 88.

Nicolls prayed the opinion of the court in this case: lessee of tithes (without any barn or soil) rendering rent, with a proviso that if the rent be not paid the lease should be void, whether the lessor should be obliged to seek the lessee and demand the rent of him, or that the lessee ought to seek the lessor? And it was held that the lessee ought to seek the lessor, and that so it had been ruled before that time, as at the peril of the lessee the rent must be paid, otherwise the lease is gone.

Noy, 145.

2. The Time of Demand.

The time for payment of rent, and, consequently, for a demand, is such a convenient time before the sun-setting of the last day as will be sufficient to have the money counted: but, if the tenant meet the lessor on the land at any time of the last day of payment, and tender the rent, that is a sufficient tender, because the money is to be paid indefinitely on that day, and therefore a tender on the day is sufficient.

Co. Lit. 202 a; Dalst. 44; And. 253; Sav. 121; 4 Leon. 171; Saund. 287. [¶]See Aley. 252; 4 Taunt. 555; [¶]β M'Cormick v. Connell, 6 Serg. & R. 151.g

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If a lease is made, rendering rent at Michaelmas between the hours of one and five in the afternoon, with a clause of re-entry, and the (a) lessor comes at the day about two in the afternoon, and continues to five, this is (b) sufficient.

Cro. Eliz. 15, Lord Cromwell v. Andrews. (a) The demand may be by attorney. 4 Leon. 179. But the power must be special, for such land of such tenant. ¶ The attorney need not produce his authority at the time of the demand, unless it is questioned. 7 East. 363; ¶ Yelv. 37; Brownl. 138. (b) Demand must be proved by witnesses, Dyer. 68;—must be made of the precise sum due. Leon. 305; Sav. 121; Mo. 207.

If a lease be made, reserving rent, upon condition that if the rent be behind at the day, and ten days after, (being in the mean time demanded,) and no distress to be found upon the land, that the lessor may re-enter; if the rent be behind at the day and ten days after, and a sufficient distress be upon the land till the afternoon of the tenth day, and then the lessee take away his cattle, and the lessor demand the rent at the last hour of the day, and the lessee do not pay it, nor is there any distress upon the land; yet the lessor cannot enter, because he made no demand in the mean time between the day of payment and the ten days, which by the clause he was obliged to do.

Cro. Eliz. 63, Worcester v. Stone.

3. *The place where the Demand is to be made.*

Here again we must observe the difference between a remedy by re-entry and distress: for when the rent is reserved, upon condition that if it be behind, that the lessor may re-enter, in such case the demand must be upon the most notorious place on the land; and therefore, if there be a house upon the land, the demand must be at the fore-door thereof, because the tenant is presumed to be there residing, and the demand being required to give notice to the tenant that he may not be turned out of possession without a wilful default, such demand ought to be in the place where the end and intention will be best answered.

Co. Lit. 153, 201; 2 Roll. Abr. 428.

And it seems the better opinion that it is not necessary to enter the house, though the doors be open, because that is a place appropriated for the peculiar use of the inhabitant, into which no person is permitted to enter without his permission; and it is reasonable that the lessor shall go no further to demand his rent than the tenant shall be obliged to go when he is bound to tender it; and a tender by the tenant at the door of the house of the lessor is sufficient, though it be open, without entering; and therefore, by a parity of reason, a demand by the lessor at the door of the tenant, without entering, is sufficient.

Dalst. 59; Co. Lit. 201; And. 27; 3 Leon. 4; and vide Cro. Eliz. 15.

But when the demand is only in order for a distress, there it is sufficient if it be made on any notorious part of the land, because this is only to entitle him to his remedy for his rent; and therefore, the whole land being equally the debtor, and chargeable with the rent, a demand upon it, without going to any particular part of it, is sufficient.

Co. Lit. 153.

If a wood be let, reserving rent, the demand ought to be made at the gate, or some highway leading through the wood, as the most notorious place.

Co. Lit. 202.

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If a rent-seck be granted out of A payable at B, the grantee may demand it at A; and if the tenant be not there to pay it, it is a disseisin, for which the grantee may have his assize; and a demand at B had likewise been good, because that, by the express appointment and agreement of the parties, was the place where the rent was made payable.

Bendl. 59; Cro. Eliz. 324; Cro. Car. 507.

But a demand of the person of the tenant is not sufficient off the land, because the demand is required to be made in order to an immediate payment; but no person is presumed to carry his wealth about with him; that is reasonably supposed to be at his place of habitation, or upon the land from whence it is gathered, and therefore the demand of the person off the land, being not sufficient to answer the intention of the demand, is useless and insignificant.

Cro. Car. 521; Co. Lit. 153.

If the king makes a lease, reserving rent, the tenant must pay it without demand, as is said, either to his receiver for that purpose, or at the receipt of the Exchequer, as well as if by the words of the lease the rent had been made payable at his Exchequer, or into the hands of his receiver. But, if the king grants the reversion, the patentee must demand the rent upon the land, because that is the place appointed by law, for the reasons already given, for a common person to demand the rent.

4 Co. 73; Co. Lit. 201; Cro. Eliz. 462; Mod. 404; Dyer, 87.

If a rent be reserved, payable at the church of S or D upon condition, it ought to be demanded at both places, because the lessee hath his election to pay it at either place; and therefore to take advantage of the condition, the lessor must demand it in such places where by his own agreement he has permitted the tenant to pay it.

2 Roll. Abr. 428.

So, if it had been reserved to be paid at or in the church of D, it ought for the same reason to be demanded both within and without the church.

2 Roll. Abr. 428.

If a lease be made of two barns, rendering rent, with condition of re-entry for non-payment, and the lessee tender the rent at one barn, and the lessor demand it at the other, yet the lessor cannot re-enter, because one barn being as notorious, and, consequently, as proper a place as the other for the payment, it is presumed that the lessee was at the proper place for payment, unless that presumption be overthrown by a demand; and therefore, since the demand was not made at both barns, there is nothing to destroy the presumption that the tenant was at the proper place ready to pay to save the condition; and if the lessor did not demand it at the proper place, he shall not take advantage of the condition.

Dyer, 329, in margin.

But, however just and reasonable the above cases and distinctions might have been, and however necessary the knowledge of them, yet now,

By the 4 G. 2, c. 28, § 2, it is enacted, "That in all cases between landlord and tenant, as often as one half-year's rent shall be in arrear, and the landlord hath right by law to re-enter for non-payment, such landlord may without any formal demand or re-entry serve a declaration in ejectment; (a) or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, (b) affix the same upon the door of any demised

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message, or upon some notorious place of the lands, &c., comprised in such declaration, which service or affixing such declaration shall stand instead of a demand and re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the court by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the declaration was served, and no sufficient distress was to be found,^(c) and that the lessor in ejectment had power to re-enter, the lessor in ejectment shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and re-entry made; and in case the lessee, or other person claiming under the lease, shall suffer judgment to be recovered on such ejectment, and execution executed, without paying the rent and arrears, with costs, and without filing any bill for relief in equity within six calendar months after execution executed, the said lessee and all persons claiming under the lease shall be barred from all relief in law or equity, other than by writ of error; provided that nothing herein shall bar the right of any mortgagee of such lease who shall not be in possession, so as such mortgagee within six calendar months after execution executed pay all rent in arrear, and costs and damages, and perform all covenants and agreements on the part of the first lessee."

[(a) The meaning of the act is, that where there is no express stipulation in the lease for entry without demand, the lessor may, notwithstanding, enter without demand, provided six months' rent is in arrear, and there is not a sufficient distress; otherwise, in such cases, a demand must be made. *Doug. 469, Goodright ex dem. Hare v. Cator.* —{See 7 East, 363, *Roe v. Davis.*} Acceptance of rent by the landlord after the lease has been forfeited, has been holden to be a waiver of the forfeiture in ejectments brought upon this act; for it is a penalty, and by accepting the rent the penalty is waived. *Per Aston, J., Cowp. 247.*] But this dictum of Aston, J., is not expressed with certainty; and in *Green's case*, Cro. Eliz. 3; 1 Leon. 262; *Pennant's case*, 3 Co. 64, it is laid down, that the mere acceptance of the rent in respect of which the forfeiture accrues, is not alone a waiver of the forfeiture, for it is a duty due to the landlord; but if he give an acquittance for it expressly as for rent, or if he distrain for it, that is a waiver: and so also, if he accept rent for a period subsequent to the forfeiture, for that admits the continuance of the tenancy. *Acc. Goodright v. Davids*, Cowp. 803; and *Roe v. Harrison*, 2 Term. R. 425, in both which cases the rent was received as rent. So, if the landlord bring an action of covenant for rent subsequent to the forfeiture, and the tenant pay it into court, the forfeiture is waived. *Doe d. Crompton v. Minshull*, Bull. N. P. 96; *Selw. N. P. 677*. But the right of re-entry is not waived by an insufficient distress for the rent in respect of which the forfeiture accrues. *Brewer d. Lord Onslow v. Eaton*, cited 6 Term R. 220; nor by any distress, (as it would seem,) for such rent if made before the forfeiture is complete, although the landlord remain in possession under the distress after the forfeiture. *Doe v. Johnson*, 1 Stark. 411; and vide 2 Espin. Ca. 393. Whether rent subsequent to the forfeiture can in any circumstances be received without a waiver, has not been decided. In case of notices to quit, the acceptance of rent subsequent is not of itself a waiver of the notice, but only evidence for the jury to judge whether it was paid as rent or as compensation for a trespass. *Cowp. 243*; 1 Ball. & Be. 561; 6 Term R. 220; 2 Camp. 387; though a distress for such rent has been held a waiver of the notice, *Zouch v. Willingale*, 1 H. B. 311; but not a distress, *come semble*, for rent due previous to the time of quitting according to the notice, 1 H. B. 312. But as the law leans against forfeitures, the two cases are distinguishable. In cases of leases for life, the mere acceptance of rent subsequent to the forfeiture is of itself a waiver; since the rent could only be received as rent, there being no personal contract or duty. *Pennant's Ca.* 3 Co. 64; *Adams on Eject.* 156, (2d ed.) The service of the declaration in ejectment is put by the statute in the place and stead of a demand of rent and re-entry, and therefore it is no objection that the declaration is served on a day subsequent to the demise stated in it, such demise being after the rent became due, for the lessor's title accrued on the day when the forfeiture would have accrued at common law by non-payment of rent. *Doe v. Shawcross*, 3 Barn. & C. 752.] (b) A very little matter is sufficient to keep the possession; therefore where

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the defendant had left some beer in the cellar, and the landlord proceeded as on a vacant possession, the judgment and execution were set aside with costs. Bull. Ni. Pri. 97, (4th edit.) *Savage v. Dent.*] ||2 Chit. Rep. 177. (c) If a landlord is prevented by the tenant from entering, he may recover under the statute, without showing that there was actually no sufficient distress. *Doe v. Dyson, Moo. & Malk.* 77, and see 15 East, 286. ||

[§ 3. If the lessee, his assignee, or any other person, claiming any right, title, or interest at law or in equity to the lease, shall, within the time aforesaid, file one or more bills for relief, in any court of equity, he shall not have or continue any injunction, against the proceedings at law on such ejectment, unless he shall, within forty days next after a full and perfect answer shall be filed by the lessor of the plaintiff in such ejectment, bring into court, and lodge with the proper officer, such sum and sums of money as the lessor of the plaintiff shall in his answer swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and in case the bill shall be filed within the time aforesaid, and after execution executed, the lessor of the plaintiff shall be accountable for no more than he shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if that happen to be less than the rent reserved on the lease, then the lessee, before he shall be restored to his possession, shall pay to the lessor or landlord what the money he so made fell short of the reserved rent, for the time he held the lands.]

§ 4. Provided, that if the tenant shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into court where the cause is depending, all the rent and arrears, together with the costs, all further proceedings on the said ejectment shall cease and be discontinued; and if the lessee, his executors, administrators, or assigns, shall, upon such bill filed as aforesaid, be relieved in equity, he and they shall hold the demised lands according to the lease thereof made, without any new lease to be thereof made to him or them.]

||The legislature appears to have had four different objects in view in the enactments of this statute:—First, to abolish the form of a demand of rent, where no sufficient distress can be found upon the premises to answer that demand; secondly, in case of beneficial leases which may have been mortgaged, to protect the mortgagees against the fraud and negligence of their mortgagors; thirdly, to render the possession of the landlord secure, after he has recovered the lands; and, fourthly, to take from the court the discretionary power they formerly exercised of staying the proceedings, at any stage of them, upon payment of the rent in arrear and costs. The first of these objects is effected by permitting the landlord to bring his ejectment without previously demanding the rent; the second, by permitting the mortgagee not in possession to recover back the premises at any time within six months after execution executed, by paying all the rent in arrear, damages, and costs of the lessor, and performing all the covenants of the lease; the third, by limiting the time for the lessee, or his assigns, to make an application to a court of equity for relief, to six calendar months after execution executed; and the fourth, by limiting the application of the lessee to stay proceedings upon payment of the rent in arrear

(I) Recovery and Demand of Rent. (*Stat. 4 Geo. 2, c. 28, § 2.*)

and costs, to the time *anterior* to the trial, and making it compulsory upon the court to grant the application when properly made.

3 Taunt. 402; *Roe d. West v. Davis*, 3 Taunt. 402; *Doe v. Masters*, 2 Barn. & C. 490.

As this statute dispenses with a demand for rent in those cases only where there is no sufficient distress upon the premises, as well as six months' rent in arrear, it is still necessary for the lessor to comply with all the formalities of the common law, before he can proceed on a clause of re-entry for non-payment of rent, if a sufficient distress can be found. But an insertion in the proviso of the lease, that the right of re-entry shall accrue upon the rent being *lawfully demanded*, will not render a demand necessary if there be no sufficient distress; for it is only stating, in express words, that which is, in substance, contained, from the principles of the common law, in every proviso of this nature.

Doe d. Forster v. Wandlass, 7 Term R. 117; *Doe v. Alexander*, 2 Maul. & S. 525.

The provisions of this statute, with the exception of the one relating to the demand of rent, extend to all cases where there is six months' rent unpaid, and the landlord has a right to re-enter. This point has only been decided on that part of the fourth section which directs all proceedings to be stayed upon payment of the rent in arrear and costs before trial; but the principle of the decision seems to apply to all the other provisions of the statute. It was objected in that case that the statute only applied to cases of ejectment brought after half a year's rent due, where no sufficient distress was to be found upon the premises; but Lord Ellenborough, C. J., says: the statute is more general in its operation; for though the fourth clause has the word "such" (*such* ejectment,) yet the second clause to which it refers is in the disjunctive, stating first, that in all cases between landlord and tenant, when half a year's rent shall be in arrear, and the landlord has a right of re-entry for non-payment thereof, he may bring ejectment, &c.; or in case the same cannot be legally served, &c., or in case such ejectment shall not be for the recovery of any messuage, &c., and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall appear by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the declaration served, and that no sufficient distress was to be found on the premises, and that the lessor had power to re-enter, then, and in every such case, the lessor shall recover judgment and execution.

Roe d. West v. Davis, 7 East, 363.

By the words of the fourth section, the lessee is to pay the arrears of rent, &c., into court before the trial; and no provision is expressly made for his relief, in case he should suffer judgment to go by default against the casual ejector. If, however, the point should arise, it is probable that the court would not consider a judgment so obtained as equivalent to a trial, but would grant relief to the lessee at any time before execution executed. In the case of *Goodtitle v. Holdfast*, which was decided about the time when the statute was enacted, relief was given under such circumstances; but as there is no allusion to the statute in the report of the case, it is probable that the decision took place before it passed into a law.

Goodtitle v. Holdfast, 2 Stra. 900. The rent can only be calculated to the last rent-day, not to the day of computing. 4 Taunt. 883.

The provision of this fourth section seems also to extend only to cases

(K) Remedies for Rent. (*Distress.*)

where the rent and costs are tendered to the lessor, or paid into court after action brought; yet where the tenant tendered the rent in arrear after the lessor had given instructions to his attorney to commence an action, but before the declaration had been delivered, the court set aside the proceedings, with costs, although it was urged by the lessor that such tender was merely matter of defence at the trial.

Goodright d. Stephenson v. Noright, Black. R. 746.

Where the ejectment was brought on a clause of re-entry in the lease for not repairing, as well as for rent in arrear, under the statute, it was urged, on a motion to stay proceedings upon payment of the rent, that the case was not within the act, because it was not an ejectment founded singly on the non-payment of rent; but the court notwithstanding made the rule absolute, with liberty for the lessor to proceed on any other title. But where the lessor has recovered possession of the premises, a court of equity will not grant relief under the second section, if such recovery was by reason of the breach of other covenants or conditions, as well as by the non-payment of rent. And where the tenant applied to the Court of Chancery to relieve against a recovery upon a judgment by default against the casual ejector, alleging that the action was brought for a forfeiture incurred by non-payment of rent, which allegation was contradicted by the landlord, who stated in his answer that the tenant had also broken many of the covenants of the lease, for which the landlord had a right to re-enter; the court directed an issue to try whether the landlord knew of the breaches of covenant at the time of bringing the ejectment.

Pure d. Withers v. Sturdy, B. N. P. 97; *Wadman v. Calcraft*, 10 Ves. 67; and vide 2 Scho. & Lef. 400; 2 Ball. & B. 104; 2 Dow. P. C. 526.

Where the lessors of the plaintiff were both devisees and executors, and rent was due to them in each capacity, the defendant moved to stay proceedings on payment of the rent due to the lessors of the plaintiff, as devisees only, they not being entitled to maintain ejectment as executors; and the rule was made absolute.

Barnes, 184.

The proceedings may be stayed either by moving the court, or in vacation by summons before a judge.

2 Sell. Prac. 127; *Adams on Ejectment*, 143, 155, (2d ed.)

(K) The several Remedies for the Recovery of Rents: And herein,

1. *Of the Remedy by Distress.*

THE remedy by distress is by the common law incident to a rent-service; but in case of a rent-charge, it must be expressly provided for by the deed.*

Vide tit. *Distress*. *The executors of tenants in fee-simple, fee-tail, or for lives of rents, shall have debt or distress for the arrears. 32 H. 8, c. 37.—Exceptions of manors in Wales, [whereof tenants have immemorially paid redemption-money in discharge of duties and forfeitures; and vide as to this statute, *post*, 500.] Ibid. § 2.—Husbands seised in right of wives, or tenants *pur auter vie*, after the death of the wife, or *cestui que vie*, may distrain or have debt for the arrears. Ibid. § 3.—Distress given for rent-seek, [rents of assise, and chief-rents which have been duly paid for the space of three years within the space of twenty years before the first day of the session of parliament when the statute passed; or shall hereafter be created, as in case of rent reserved upon lease. 4 G. 2, c. 28, § 5. For a rent granted in fee since the statute of *quia emptores*, and before the passing of this statute, there cannot be a distress but under this statute, and therefore is an avowry for such a distress, the case must be brought within it. Dougl.

(K) Remedies for Rent. (*Distress*.)

604, *Bradbury v. Wright*.]—Crops growing may be distrained. 11 G. 2, c. 19, § 8.—If goods are seized on an extent on an outlaway, the landlord shall not have the goods delivered to him, though he distrained before the extent. *Rex v. Southerly*, Bunn. 5. [It is settled, that goods distrained for rent and not sold, are liable to seizure on an immediate extent for the king's own debt; for the mere distress does not change the property. *Parker*, 112. *Rex v. Cotton*. Whilst goods are upon the premises the landlord may distrain them, notwithstanding an actual assignment under a commission of bankrupt. 1 Atk. 103, *Ex parte Plummer*. But, if the goods are carried off the premises, or sold, he loses his lien upon them. 1 Atk. 104, *Ex parte Grove*; 1 Co. Bankrupt Laws, 221, *Ex parte Devine*. So he does if the goods are replevied, and the lessee afterwards, and before any proceedings in replevin, becomes bankrupt, and the assignees sell the goods. *Bradyll v. Ball*, 1 Br. Ch. Rep. 427; {2 Dall. 68, *Woglam v. Cowperthwaite*; *Ibid.* 131, *Frey v. Leeper*.} Where a trader, after committing an act of bankruptcy, takes a shop and agrees to pay half a year's rent in advance, where by the custom of the country so much becomes due on the day on which the tenant enters, the landlord after an assignment under the commission, and before the expiration of the half-year, may distrain the goods on the premises for half a year's rent. *Buckley*, assignee of *Buckley, v. Taylor*, 2 Term R. 600.]—** The landlord is to have his year's rent without any deduction for sheriff's poundage. *Gore v. Goston*, Str. 643.—The ground landlord of a house is not entitled to a year's rent on an execution against an under-lessee. *Bennet's case*, Str. 787.—On an outlaway, *capias utlagatum*, and goods seized by process still remaining in the sheriff's hands, the landlord shall have a year's rent. *Greaves v. D'Acastro*, Bunn. 194.—If extent issues against a tenant, and afterwards, but before the extent is executed, the landlord distrains, and the inquisition finds the goods distrained to be in the possession of the tenant, the landlord shall not have the benefit of the stat. 8 Ann. *Rex v. Pritchard*, Bunn. 269.—When there are two executions, the landlord shall not have a year's rent on each. *Semb. Dod v. Saxby*, Str. 1024.—A lets land to B at 75*l. per annum* for one year; a few days before the end B says he can hold it no longer, but desires as much as will feed sixteen cows, which A complies with, and demises also the house and garden; some months after B's goods are taken in execution, no part of the rent of 75*l.* being paid; A shall not have the 75*l.* on motion, and *semb.* no rent under the act, though he proceed by action. *Cook v. Cook*, Andr. 217.—On an execution for costs on judgment of nonsuit, sheriff cannot, after he has received notice of rent due, remove the goods before he has satisfied the landlord one year's rent; unless the rent be paid, sheriff must quit; if he does not, an action lies against him; or, on motion, the court will order restitution to the amount of the goods sold, deducting costs incurred before notice. *Henchett v. Kempson*, 2 Wils. 140.—A bill of sale held to amount to a removal of goods taken by *feri facias*, and the sheriff shall pay the year's rent out of the money levied. *Barnes*, 211.** {See *Willes* 376, 377.—If rent is payable quarterly, the landlord is not entitled to the rent of the current quarter, but only to the last quarter day. 2 John. Rep. 478, *Hazard v. Raymond*. In Pennsylvania it has been decided otherwise. The landlord is entitled *pro rata* to the time of levying the execution. *West's Admrs. v. Sink*, in the supreme court, March term, 1798.}

This remedy by distress is greatly enlarged by several acts of parliament, which are taken notice of under the head of "DISTRESS," and therefore I shall here only subjoin some clauses in a late law for the more easy recovery of rents.

[[See tit. *Distress*, and *Bradly* on *Distresses*, *passim*, (2d ed.)]]

By the 11 G. 2, c. 19, § 1, it is enacted, "That in case any tenant or lessee of lands or tenements, upon the demise whereof any rent is payable, shall fraudulently or clandestinely carry off his goods to prevent the landlord from distraining,(a) it shall be lawful for every landlord, or any person by him empowered, within thirty days next ensuing such carrying off, to seize such goods wherever the same shall be found, as a distress for the rent, and the same to sell or dispose of as if the said goods had been distrained upon such premises; provided that no landlord shall seize goods sold *bonâ fide* and for a valuable consideration to any person not privy to such fraud."

[(a) It has been decided that the statute only applies where the rent has become due

(K) Remedies for Rent. (*Removal of Goods.*)

before the removal of the goods. *Watson v. Main*, 3 Esp. Ca. 15. *Sed vide Furneaux v. Fotherby*, 4 Camp. 136. Whether the removal is fraudulent or not, is a question for the jury. *Welch v. Myers*, 4 Camp. 368. The statute applies only to the goods of the tenant. *Thornton v. Adams*, 5 Maul. & S. 38.¶

And by § 3. "If any such tenant shall fraudulently remove his goods, or if any person shall knowingly assist (a) such tenant in fraudulently conveying away his goods, or in concealing the same, all persons so offending shall forfeit to the landlord, from whose estate such goods were carried off, double the value of the goods, to be recovered by action of debt," &c.

¶(a) This does not apply to a creditor of the tenant who with the tenant's assent removes the goods to satisfy his *bona fide* debt. *Bach v. Meats*, 5 Maul. & S. 200. It must be shown that the party "assisting, &c." was privy to the fraudulent intent on the part of the tenant. *Brooke v. Noakes*, 8 Barn. & C. 537.¶

[§ 4. Provided, if such goods and chattels exceed not the value of 50*l.*, the landlord, his bailiff, servant, or agent, may exhibit (b) a complaint in writing against such offender or offenders before two or more justices of the peace of the same county, riding, or division of such county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being in the lands or tenements whence such goods were removed, who may summon the parties concerned, examine the fact, and all proper witnesses upon oath, or if any such witness be one of the people called Quakers, upon affirmation required by law, and in a summary way determine whether such person or persons be guilty of the offence with which he, she, or they are charged; and in like manner to enquire of the value of the goods and chattels by him, her, or them respectively so fraudulently carried off or concealed as aforesaid; and upon full proof of the offence, (c) by order under their hands and seals, the said justices may and shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord, his bailiff, servant, or agent, at such time as the said justices shall appoint; and in case the offender or offenders, having notice of such order, shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender or offenders, and for want of such distress may commit the offender or offenders to the house of correction, there to be kept to hard labour without bail or mainprize for the space of six months, unless the money so ordered to be paid as aforesaid shall be sooner satisfied.

(b) The complaint need not be upon oath. *The King v. Bissex*, Tr. 29 & 30 G. 2, K. B., 1 Burn's Just. title *Distress*, 8. ¶Where the value does not exceed 50*l.* the party injured may either proceed before a magistrate, or by action at his pleasure. *Horsefall v. Davy*, 1 Stark. 169; and his having at first made a complaint before a magistrate, will not preclude his afterwards bringing an action. *Ibid.* (c) This is merely an order, not a conviction, and if good in substance, great strictness in point of form is not requisite. The evidence therefore need not be set out. *The King v. Bissex*, *ubi sup.* The court will intend that the justices had jurisdiction, where the order follows the words of the statute. *Ibid.* It is not necessary to state in so many words, that the rent was in arrear when the goods were carried off; it is enough if it appears from the order. *Ibid.* Nor is it necessary to state for what time due. *Ibid.* It is enough to say that the goods were taken about such a time. *Ibid.* In a charge against a person for assisting the lessee in carrying away the goods, it is only necessary to state that offence; for the carrying away by the lessee, and the aiding him in carrying them away, are by the statute two distinct offences. *Ibid.* The stating the charge in the disjunctive, as that the defendant assisted in removing or concealing the goods, is sufficient. *R. v. Middleton*, 1 Burr. 399.

§ 5, 6. Appeal given to the quarter sessions; and appellant entering

(K) Remedies for Rent. (*Writ of Annuity.*)

into a recognisance with two sureties in double the sum ordered by the two justices to be paid, the execution of such order in the mean time to be suspended.

By § 7. Landlords are empowered to break open houses, &c., to seize goods fraudulently secured therein, first calling to their assistance the constable, &c., of the hundred, borough, parish, district, or place where the same are suspected to be concealed; and in the case of a dwelling-house, (a) oath being also first made before some justice of the peace of a reasonable ground of suspicion that such goods are therein.

(a) *Before this statute it was holden, that when in the house, the landlord might break open an inner door. Comb. 17.]*

And by § 8, "It shall be lawful for every landlord to seize, for a distress, corn and grass, hops, roots, fruits, or other product growing on the estates demised as a distress for rent; and the same to cut, gather, and lay up when ripe in the barns or other place on the premises; and in case there shall be no proper place, then in any other barn or proper place which such landlord shall procure as near as may be to the premises, and in convenient time to appraise, sell, or dispose of the same towards satisfaction of the rent, in the same manner as other goods may be seized and disposed of; the appraisement to be taken when gathered and made."

[By § 9. The distress of corn, &c., is to cease, if the rent in arrear, and the costs of making the distress, be paid before it is cut.]

2. *Of the Remedy by Writ of Annuity.*

If a man grants by his deed an annual rent to J S, in fee, for life or for years, and the rent is behind, the grantee may bring his writ of annuity against the grantor, and thereby charge his person; and this remedy is founded on the words of the contract, which, being presumed to be founded on a valuable consideration, are always taken most strongly against the grantor; and therefore, where a man grants an annual rent, the person granting is as well liable to the charge as the land, because the person of the grantor ought to be liable to the payment of what he himself hath given.

Lit. § 219, F. N. B. 152; 6 Co. 58.

Hence it follows, that no writ of annuity lies for a rent-service, because the rent-service being something reserved by the lessor by way of retribution for the land demised, proceeds not from the grant of the lessee, the reservation being the act of the lessor, and, consequently, the person of the lessee ought not to be liable to the discharge of a thing it never granted; (b) for the lessee is only passive, and takes the lands upon such terms as the lessor is willing to part with it, and by such acceptance of the land agrees to the reservation of the rent.

Roll. Abr. 226. ||(b) But the person of the lessee is liable in an action of debt on the demise, or debt or *assumpsit* for use and occupation.]]

It follows also, that if a man devises rent out of his land, and dies, that no writ of annuity lies for such rent, because the devise cannot take effect till after the death of the deviser, and then it is impossible to charge the person.

6 Co. 58 b.

So, no writ of annuity lies for a rent granted for equality of partition, or in lieu of dower; for though these be given by the person, yet. being

(K) Remedies for Rent. (*Re-entry.*)

granted in satisfaction of a real estate, they retain the nature of the things for which they are given, and therefore not recoverable in a personal action.

But for the further explanation hereof, vide tit. "ANNUITY."

3. *Of the Remedy by Assise.*

The writ of assise lies to restore the party to the actual seisin of that freehold which he hath been divested of, and consequently the party who brings it must have at least an estate for life in the rent, and must have been in the seisin and enjoyment thereof.

Vide tit. *Assise.*

4. *Of the Clause of Re-entry.*

The condition of re-entry for non-payment of rent was the remedy by the ancient law, which was afterwards changed into a distress; but is yet a remedy allowable at law, where the party provides {} it by the deed; as, if a man makes a feoffment, gift, or lease, reserving rent, with a condition that if the rent be behind, that it shall be lawful for the feoffor, &c., and his heirs, into the lands to re-enter; in these cases, if the rent be not paid according to the deed, the feoffor or lessor may enter into the lands, and hold them in his former estate, because the feoffment or lease was not absolute, but defeasible by the non-performance of the condition.

Lit. § 325; Co. Lit. 201, 202; Gilb. on Rents, 135; {} And the clause providing it must be construed strictly, and not extended beyond the express words. Therefore where a leasehold estate was devised to B subject to a rent-charge payable to the testator's wife during her widowhood, *with power to the widow to enter for non-payment; and after her marriage or death the testator willed that the rent-charge should be paid to others; the right of re-entry was held to be confined to the widow.* Willes, 500, *Hassell v. Gowthwaite.* {} *Vide ante*, p. 488, 489, 490, for the provisions of the 4 G. 2, c. 28, as to ejectments on these provisoes. ||

But, where a feoffment is made of lands, reserving rent, upon condition that if the rent be behind, it shall be lawful for the feoffor and his heirs to enter and hold the lands, and take the profits *till he be satisfied and paid* the rent behind; this is not a condition absolutely to defeat the estate; but the feoffor in this case shall upon his entry only hold the land as a pledge, or in nature of a distress, till the rent be paid him, and the profits shall not go into the account of the rent, but shall be applied to his own use, that by such perception the tenant may be obliged the sooner to pay the arrears of rent.

Mit. § 327.

But, if the condition be, that if the rent be behind, the lessor shall re-enter, and take the profits *until thereof he be satisfied*; there, the profits shall go into the account of the rent, and consequently, when the profits received are equivalent to the arrear of rent, the lessee may re-enter and hold it under the former lease.

Co. Lit. 203. [The distinction when the profits taken by the lessor after entry are, and when they are not to be in satisfaction of the rent, is not admitted in equity; for the courts of equity will always make the lessor account to the lessee for the profits of the estate during the time of his being in possession of it, and decree him after he is satisfied the rent in arrear, and the costs, charges, and expenses attending his entry and detention of the lands, to give up the possession to the lessee, and deliver and pay him the surplus of the profits of the estate, and the money arising thereby. Co. Lit. 203, a, n. 3.]

(K) Remedies for Rent. (*Re-entry.*)

And though part of the rent be paid him before re-entry, yet, if the whole be not satisfied, he may re-enter for any part that is in arrear, because the condition is to enforce the payment of the whole rent, and therefore he may take advantage for non-payment of any part thereof.

Cro. Ja. 511; 4 Leon. 8.

If a man grants a rent-charge to J S, his heirs and assigns, and if it shall happen that the rent shall be behind and unpaid, that then the said J S, his heirs and assigns, shall enter into the land, and have and enjoy the rent thereof *until the arrears be fully satisfied*, and the grantor covenants to levy a fine to the uses of the said deed; if after the fine levied the rent be arrear, the grantee may enter into the land, or make a lease for years; to try his title in ejectment, because by the fine there is an estate vested in the conusee to raise a use in the grantee of the rent-charge when the rent is behind; and whenever the rent becomes arrear, *the possession is executed to that use*, and consequently the grantee has a right to take and keep that possession till the use for which it was executed be satisfied, and that was till the arrears of rent be paid by the perception of the profits; and therefore though the grantee's interest in the land be uncertain, (because it is uncertain when the rents will be paid out of the profits,) yet, while his interest remains, if his possession be disturbed or divested, he may restore it by ejectment, which is the proper remedy to recover the possession. And if the grantee assigns over the rent the assignee may likewise enter and maintain a title in ejectment; for though the use arises out of the estate of the conusee only as the rent is in arrear, and till the rent be behind and unpaid there is nothing more than a bare possibility of a use, which in its nature is not assignable, yet by the conveyance of the rent it shall pass, because it is nothing more than a remedy or security for the rent, and therefore shall attend that, into whose hands soever it comes.

Cro. Ja. 510, 512; 2 Roll. Rep. 12, 427; Poph. 126, 147; 3 Bulst. 250; Sid. 262; Lev. 171.

And by the better opinion it seems, that if the rent be arrear before the fine levied, yet the fine levied afterwards shall be sufficient to raise a use in the grantee to enter into the land for the recovery of those arrears, because the fine is guided by the deed of grant, and both amount but to one assurance, and, consequently, the fine shall have relation to that deed which leads the use of it and makes it operate.

Cro. Car. 512.

So it is if such a rent had been granted to a man and his heirs, and if the rent be behind and unpaid, then it shall be lawful for the grantee and his heirs to enter, &c., the grantee, when the rent is arrear, may by such proviso enter and hold the land till he be paid the rent by the perception of the profits; for though it was objected that there was no estate conveyed, out of which a use might arise to the grantee upon the non-payment of rent, and that this grant could pass no estate to the grantee as a conveyance at common law, because the grantee could have no inheritance or freehold in the land when the rent was in arrear for want of livery, nor an estate for years for want of a certain commencement and determination; yet it was adjudged, that by the grant he had an interest vested in him when the rent was arrear; and though it be an uncertain interest, which for the uncertainty of its commencement and determination might be void by the strict rules of law, if it were granted independent on any estate certain, yet it is good in this case, because it is created to attend a determinate estate, and

(K) Remedies for Rent. (*Nomine Pænæ.*)

the non-payment of the rent fixes the certainty of its beginning, and the satisfaction of the arrears by the perception of the profits, the end and determination of such interest, and therefore the grantee may reduce such interest as it arises into his possession by ejectment, which is the proper remedy to recover the possession.

Sid. 223, 262, 344; Lev. 170; Keb. 784; Raym. 135, 158; Sand. 112, *Jemett v. Cowley*.

§ Where the lessee of a house for the term of a year absconded during the term, and afterwards his family locked up the house and followed him, without leaving goods on the premises sufficient to pay the rent, in an action of trespass by the tenant against the lessor, it was held that this might be considered as an implied surrender of the lease, and that the lessor was not liable in trespass for re-entry.

McKinney v. Reader, 7 Watts. 123.*g*

5. Of the *Nomine Pænæ*.

This is not so much a remedy for the recovery of rent, as a penalty to oblige the tenant to a punctual payment, and this as well of a rent-charge as a rent-service: and herein these things seem observable.

Gilb. on Rents, 140; Lil. 4; Palm. 206; 2 Lutw. 1151.

That in case of a rent-service or rent-charge, if it be granted that if the rent be arrear, that the tenant shall forfeit 8s. a day as a *nomine pænæ*, there must be an actual demand of the rent at the day to give a title to the penalty, because, till an actual demand made, it cannot appear that there was any default or neglect in the tenant, and it were unreasonable to oblige the tenant to pay such penalty without a wilful default; for the presumption is, that he was ready to pay the rent to save the penalty; and there is no way to overthrow that presumption but by proving an actual demand made, and then if such demand be not answered by payment, it is evident that the tenant has wilfully neglected it, and consequently has submitted himself to the penalty.

Hob. 82, 208; Brownl. 171; 2 Jon. 33.

But if rent be demanded at the day, and not paid, and, consequently, the penalty forfeited; as, if a rent be granted to A for life, and, if it shall be arrear by the space of ten days after the feasts of payment, being lawfully demanded, that then the grantor shall forfeit 10s. by way of pain, and that then and so often it shall be lawful for the grantee to distrain till the rent and penalty be satisfied; by the opinion of Hob. if the grantee demands the rent at the end of the ten days, by which he becomes entitled to the penalty, the grantee on the eleventh day must likewise demand the penalty, because it is not due till after the ten days incurred, and the grantor has the whole day on which the penalty becomes due to pay it. But *quære* whether the grantee be obliged to demand the penalty after it becomes due.

Hob. 208; Hutt. 42, 114; Hetl. 87. [To entitle himself to the penalty, Hobart thought that there must be a demand of the rent on the day after it became due, that is, in the case here put, on the eleventh day.]

But, if the plaintiff brings an action of debt, or avows for the rent and *nomine pænæ*, without laying any actual demand for the rent, though he cannot recover the penalty for want of such demand, yet he shall, by such suit, have judgment for the rent, because that is really due, and ought to be paid without any demand.

Hob. 82, 13. But *per* Holt, C. J., if a lessor avows for rent and a *nomine pænæ*, and the rent was not demanded, so that the *nomine pænæ* was not due, a general judgment for both shall be entirely reversed. *Ld. Raym.* 256.

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If the tenant, that is chargeable with the rent, assigns over his interest in the land, it seems, that the assignee is chargeable with the penalty for any arrear incurred in his own time, because the *nomine pænæ* being intended as an obligation on the tenant to pay the rent, that obligation, from the nature of the contract, must have continuance so long as the rent is payable; and therefore whoever takes the land, takes it under the charge of the rent, and, consequently, must be subject to that security which was originally taken upon the creation of the rent.

Cro. Eliz. 383; *Thynn v. Cholmly, Moor*, pl. 486.

If the rent be devised without mention of the *nomine pænæ*, yet it shall pass as incident to the rent, because whoever has a right to the rent, ought to have all that security for the payment of it which was taken upon the original creation of it.

Cro. Eliz. 895, *Bendloss v. Phillips*.

The *nomine pænæ*, as an incident to the rent, shall descend to the heir, because, being a security or penalty to engage the payment of the rent, whoever has a right to the rent, ought, in reason, to have the penalty, which is to oblige the tenant to pay it. But the statute of 32 H. 8, c. 37, ||see next page,|| gives no remedy for the recovery of the *nomine pænæ*, as it does for rents, because the grantee of a rent-charge might have an action of debt for the arrears of the *nomine pænæ* at common law; for, being only a penalty, they looked on it to be only a chattel, since it did not grow due with every gale of the rent, but arose casually upon the non-payment of the rent at the day; and for the same reason the executors of the grantee might have an action of debt, and, consequently, there was no necessity for the statute to provide a remedy.

Co. Lit. 162.

6. *Of the Remedy by Action of Debt, &c., and as grounded on several Acts of Parliament: And herein of "double Value" and "double Rent."*||

The remedy by action of debt extended only to rents reserved on leases for years, but did not affect freehold rents; the reason whereof is this: actions of debt were given for rent reserved upon leases for years, for that such terms being of short continuance, it was necessary that the lessor should follow the chattels of his tenant, wherever they were or wheresoever he should remove them: but when the rents were reserved on the durable estate of the feud, the feud itself, and the chattels thereupon, were pledged for the rent; and if the land were unstocked for two years the lord had his *cessavit per biennium* to recover the land itself; and hence it is, that if the durable estate of the feud determined, as, if the lessee for life died, the lessor might have an action of debt for the arrears; because the land was no longer a security for the rent; and therefore the chattels of the tenant were liable to satisfy the arrears in an action of debt wherever the tenant removed them.

Gilb. on Rents, 93; Co. Lit. 162.

So it was in case of a rent-charge; for if a man were seized of it in fee, and it was arrear, he could have no action of debt for the arrears; and if he died, his heir could not have any real action for the arrears, for that is proper for the recovery of the possession, which was still in him, nor could he have a personal action, because, besides the former reason, it were absurd to give a real action for the rent running on in his own time, and a personal action for the arrears in the lifetime of the ancestor at the same time; for it could not be supposed to be both a real and personal thing: for this reason

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also the executor could have no action for the arrears, (who is entitled to the personal estate;) and also because he could not entitle himself by virtue of the contract that created the rent, since the heir was constituted representative by the contract, and by consequence that representation excluded all other persons from taking any benefit as representatives that did not come under that character.

Co. Lit. 162; 4 Co. 49.

But these inconveniences and mischiefs are remedied by an act of parliament, by which it is provided, "That whereas no action of debt lies against a tenant for life or lives, for any arrears of rent, *during the continuance of* such estate for life or lives, it shall and may be lawful for any person or persons, having any rent in arrear, or due upon any lease or demise for life or lives, to bring an action or actions of debt for such arrears of rent, in the same manner as they might have done in case such rent were due and reserved upon a lease for years."

8 Ann. c. 14, § 4.

|| This statute, however, only applies to the case of rent due from a tenant to a landlord, and does not extend to the case of an annuity or yearly rent devised to A, and payable during the life of B out of lands devised by the same will to B; and therefore, during the continuance of the freehold estate in the rent, an action of debt does not lie by A against B for the arrears.

Webb v. Jiggs, 4 Maul. & S. 113. ||

And by the statute of 32 H. 8, c. 37, (a) the executors of a man seized either of a rent-charge, rent-service, or rent-seck, either in fee-simple or fee-tail, or for term of lives, have now a double remedy given them for such arrears, either by action of debt or distress: the action of debt lies not only against the tenant that ought to have paid the rent, but against his executors and administrators; the distress runs with the land as long as it continues in the tenant's possession that suffered the rent to run in arrear, or of any other person claiming by or from him.

Co. Lit. 162; Cro. Car. 471; Lit. Rep. 93; 4 Co. 48, 50; Vaugh. 40. || (a) Although the preamble of this statute would rather seem to confine it to executors of tenants for life who had no remedy at common law, i. e. executors of tenants *pur auter vie* during the life of *cestuique vie*, and although Lord Coke's language, Co. Lit. 162 a, and the case of Turner v. Lee, Cro. Car. 471, are in favour of this narrow construction, yet it has been decided, that the statute extends to all executors of tenants for life of rents, as well executors of tenant for his own life, who had an action of debt at common law, as to executors of tenants *pur auter vie*, who, during the continuance of the life, had no remedy at all. Hool v. Bell, Ld. Raym. 172; Co. Lit. 162 a, n. 4, 762 b, n. 1; 18 Vin. 542; and vide Cro. Eliz. 332. It seems doubtful whether this statute extends to cases of arrears due on leases for years, since the statute only specifies tenants in fee-simple, fee-tail, and for lives, of rents, &c. Meriton v. Gilbee, 2 B. Moo. 48; Selw. N. P. 645, (4th ed.) ||

And therefore, if a man grants a rent-charge in fee, and afterwards makes a feoffment of the land out of which it issues, and the feoffee makes a lease at will, the executors of the grantee may distrain the tenant at will for any arrears that became due in the lifetime of the grantor, because such tenant claims from the grantor; and so every feoffee of the first feoffee in *infinitum* claims immediately from the grantor.

4 Co. 50; 2 And. 178; 4 Leon. 115, Andrew Ognell's case.

So, if the tenant makes a gift in tail, and the donee dies, the issue is

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chargeable with the arrears of the rent; because though he claims by descent *per formam doni*, yet it is by virtue of the gift made by the tenant.

4 Co. 50.

But, if tenant in tail makes a gift in fee, and dies, and the discontinuee charges the land with a rent in fee, and then enfeoffs the issue in tail within age, so as he is remitted, the issue is chargeable with none of the arrears; because, being remitted by the feoffment to the old estate-tail, he cannot claim under the discontinuee, but from the first donor.

Noy, 48; Moor, 846, pl. 1143; 2 Roll. Abr. 422; 2 Vern. 612.

So it is, if the tenant dies without heirs, so that the tenancy escheats to the lord, he shall not be chargeable with any arrears of a rent-charge incurred in the life of the tenant.

Co. Lit. 162.

But before these acts, if there had been tenant for life of a rent, and he died, the rent being in arrear, (a) his executors, by the common law, might have an action of debt for the arrears; for the executor, representing the person of the testator, succeeds in all his personal rights; and, when the rent is arrear at his death, is no more than a single personal duty, distinct and separate from the real estate, for which there can be no remedy by real action, which recovers the freehold of which the possessor was disseised; but the arrears of the rent being no freehold, but a perfect chattel or single duty, were recoverable by the executor as all other personal things; and though the freehold determined by the death of the tenant for life, yet they did not construe such duties to cease, because there were no words in the contract to found such a construction upon; for the contract gave him the entire rent during life, and the act of God did not take it away.

Co. Lit. 162. [(a) And now by st. 11 G. 2, c. 19, § 15, the executors of tenants for life have a remedy for an apportionment up to the death of the tenant for life; but this only applies to rents on *demises* determining by death of tenant for life.]

If tenant *pur auter vie* or tenant for years held over, yet the lessor could not distrain them for the rent that became due before the determination of the respective leases, though they continued in the possession of the land afterwards; for when the lease was determined, the lessor could not avow on them as his tenants, claiming under a lease that was ended. To remedy this it (b) is provided, that whereas tenant *pur auter vie* and lessees for years, or at will, frequently hold over the tenements to them devised, after the determination of such leases; and whereas after the determination of such or any other leases, no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof,—“It shall and may be lawful for any person or persons, having any rent in arrear, or due upon any lease for life or lives, or for years, or at will ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord’s title and interest, and during the possession of the tenant from whom such arrears became due.”

(b) By the said statute, 3 Ann. c. 14. [See the cases on this branch of the statute of Ann. tit. *Distress*, (A).]

(K) Remedies for Rent. (*Double value, and Rent.*)

§ Covenant, in a proper case, lies against the original grantee or his assignee for the non-payment of rent, although there was personal property on the premises which might have been distrained.

Royer v. Ake, 3 Pennsylv. 461.

When there is an express covenant on the part of the lessee to pay the rent, the covenantor is liable in an action of covenant when the lease is under seal, although before the breach he may have assigned his interest, and the lessor may have accepted rent from the assignee.

Dewey v. Dupuy, 2 Watts & Serg. 556.

A purchaser of a ground-rent at sheriff's sale, is entitled to the benefit of the covenant for the payment of the rent, and may maintain an action upon it.

Streaper v. Fisher, 1 Rawle, 155.

In debt for rent, tenants in common must all join as plaintiffs, but in distress and avowry, which savour of the realty, the tenants must not join.

Decker v. Livingston, 15 Johns, 479.

Where A and B let certain premises, *habendum* to the tenants for five years in consideration of the payment of an annual rent of \$600: Held, that both lessors might join in an action for the non-payment of the rent, although, after the *habendum*, there was a covenant on the part of the lessee to pay to the lessors, "to each an equal half or moiety of the rent," and that the lessors had a joint interest in the rent, until severed by a several payment.

Tylee v. McLean, 10 Wend. 373.

||DOUBLE VALUE FOR HOLDING OVER.||—Also, for the more effectual recovery of rents, it is provided, "That in case any tenant for life or years, or other person who shall come into possession of any lands, &c., under or by collusion with such tenant, shall wilfully hold over after the determination of such term, and after demand made, and notice in writing given, for delivering of the possession thereof, by the person to whom the remainder or reversion shall belong, or his agent, thereunto lawfully authorized, such person holding over shall pay *double* the *yearly value* of the lands, &c., so detained, to be recovered by action of debt, whereunto the defendant shall be obliged to give special bail; against which penalty there shall be no relief in equity."

4 G. 2, c. 28, § 1.

||A tenant holding over under a fair claim of right is not within this act, although it be decided eventually that he has no right. Notwithstanding the order in which the words stand in the statute, from which it should seem that the notice ought to be given *after* the determination of the term, yet the notice may be given *before* the determination; and the notice to quit in writing has been held to include a demand, the court considering the statute as a remedial law in favour of landlords, the penalty being given to the party grieved. And on this ground it was held, that where a woman had received notice to quit, and before the expiration of the tenancy married, it was not necessary to make a demand on the husband in order to entitle the landlord to an action against him for double value for wilfully holding over. But *Chambre, J.*, considering the action penal, thought a demand ought to have been made on the husband. Lord Ellen-

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borough, C. J., has also held the statute penal, and to be construed strictly, and therefore that the words of it could not be extended to the case of a tenant from week to week. Nor can the landlord distrain for double value.

Wright v. Smith, 5 Espin. 203; Cutting v. Derby, Black. R. 1075; Wilkinson v. Colley, Burr. 2694; Lake v. Smith, 1 New R. 174; Lloyd v. Rosbee, 2 Camp. 453; Sullivan v. Bishop, 2 Car. & P. 359.

Where the demise is for a time certain, as for one year, and no longer, a notice to quit is not necessary at the end of the year to put an end to the tenancy; but a demand of possession is necessary to entitle the landlord to double value, and the demand may be made after the expiration of the term, but the landlord will be entitled to double value only from the time of the notice and demand.

Cobb v. Stokes, 8 East, 358.

A receiver appointed under an order of the Court of Chancery is an agent within the statute, and may give the notice.

Burr. 2694.

This action may be supported after a recovery of the premises by the landlord in ejectment; for there is no incongruity in bringing both actions, the action of ejectment being for recovery of possession, and the action for double value to indemnify the landlord for the wrong in holding over.

Soulsby v. Neving, 9 East, 310; and vide 10 East, 48; Doug. 175; 1 Term R. 53.

One tenant in common may maintain an action for double value of his moiety without his companion.

Black. R. 1077.

DOUBLE RENT FOR HOLDING OVER. ||—By a subsequent act it is provided, “That in case any (a) tenant shall give notice of his intention to quit the premises, and shall not accordingly deliver up the possession at the time in such notice contained, the said tenant, his executors or administrators, shall pay to the landlord double the rent which he should otherwise have paid.”

11 G. 2, c. 19, § 18. (a) Tenant by parol demise from year to year is within this statute, and liable to pay double rent, if he does not quit after giving notice. Timmins v. Rowlinson, 3 Burr. 1603.—If tenant gives parol notice that he will quit, it is sufficient, and subjects him to double rent if he does not. Ibid. ||Some fixed time must be specified in the notice; a notice that the tenant will quit as soon as he can possibly get another situation, is not sufficient to render him liable for double rent. Ferrance v. Elkington, 2 Camp. R. 591. The notice must be such a one as is binding on the tenant, so that the landlord might maintain ejectment, or it will not subject the tenant to double rent for not quitting. Johnstone v. Huddleston, 4 Barn. & C. 922. It seems that this action cannot be supported after judgment in ejectment against the tenant, since the ejectment treats him as a trespasser, and the action for double rent as a tenant. 9 East, 314; and vide Cowp. 245. || In New York, when the tenant wilfully holds over after the expiration of his term and notice to quit, the landlord is entitled to double rent. Hall v. Ballantine, 7 Johns. 536.

||7. Of the Remedy by Action for Use and Occupation.

The 11th Geo. 2, c. 19, § 14, is as follows:—“To obviate some difficulties that many times occur in the recovery of rent where the demises are not by deed, be it further enacted, that, from and after the said 24th day of June, it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the

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defendant or defendants in an action on the case for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as evidence of the *quantum* of damages to be recovered."

Before this statute an action of *assumpsit* would lie on a promise to pay a sum of money in consideration of a permission to occupy lands, and the objection of its being real contract, for which *assumpsit* would not lie, was got rid of by considering the sum to be paid as a compensation due on the contract, and not as rent, and the permission to occupy as not amounting to a demise. But then it seems that the plaintiff would have been nonsuited, if he produced in evidence in such action any parol demise or agreement with a reservation of a certain rent; and to obviate this difficulty the above section appears to have been enacted.

Dartnall v. Morgan, Cro. Ja. 598; Chapman v. Southwicke, 1 Lev. 204. Vide 5 Taunt. 25.

The action for use and occupation only applies to cases where there is no demise or agreement under seal; although in one case, where the defendant held by an agreement under seal, not amounting to a demise, it was held that the action could be maintained.

Elliott v. Rogers, 4 Espin. R. 59. This decision is expressly against the words of the statute.

Debt also lies for use and occupation; and is frequently substituted for the old action of debt for rent. The action of debt, however, is independent of the statute.

Stroud v. Rogers, 6 Term R. 62, *notd.*

The action is transitory, and it is not necessary to state in the declaration the parish or local situation of the premises, or any particulars of the demise; but if stated, a variance in proof is fatal.

Wilkins v. Wingate, 6 Term R. 62; King v. Frazer, 6 East, 348; Egler v. Marsden, 5 Taunt. 23; Guest v. Caumont, 3 Camp. 234.

The action is founded on contract, and does not apply to an adverse or tortious holding; therefore the plaintiff, after recovery in ejectment of the premises, may recover in this action the rent up to the time of the demise in the ejectment, but not subsequently.

Buck v. Wright, 1 Term R. 378. *¶* When the defendant went on the premises as a trespasser, the plaintiff cannot recover. Henwood v. Cheeseman, 3 Serg. & Rawle, 500.*g*

¶ Since the statute 11 Geo. 2, c. 19, s. 14, to support this action an express or implied promise must be shown, and proof given that the defendant came into possession by permission of the plaintiff, or such strong circumstances as preclude an idea of an adversary claim.

Pott v. Leshar, 1 Yeates, 576.

This action is founded on privity of contract, not privity of estate.

Henwood v. Cheeseman, 3 Serg. & R. 502.

To sustain the action of *assumpsit* for use and occupation, there must be a contract express or implied.

Boston v. Binney, 11 Pick. 1. An implied promise is sufficient. Gunn v. Scovill, 4 Day, 228; Jacks v. Smith, 1 Bay, 315; Smith v. Sheriff, 1 Bay, 443. See Stoddart v. Newman, 7 Har. & J. 251.*g*

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And the holding must be under a contract of *demise*. Therefore where a party was let into possession under a contract to purchase premises, and he paid the whole purchase-money, and the vendor afterwards failing to make a title, the purchaser quitted possession and rescinded the contract, and recovered back the price as money had and received; it was held that the vendor could not recover rent for the enjoyment in an action for use and occupation: but *qu.*, if the purchase-money had not been paid, whether the vendor might not have recovered?

Kirtland v. Pounsett, 2 Taunt. 145; *sed vide* 6 Price, 157. β An action for use and occupation does not lie against a *bona fide* purchaser for a valuable consideration from the heirs of a disseisor, after a descent cast, and without notice of the disseisin. *Wharton v. Fitzgerald*, 3 Dall. 503. γ

The remedy in this action is not co-extensive with the action of debt for rent. The statute only provides an easy remedy in cases of *actual occupation*, leaving other more complicated cases to their ordinary remedy. Therefore where a bankrupt's assignees had taken possession of premises occupied by the bankrupt as tenant at a yearly rent, and held them to the end of the year, it was decided that they were not liable in this action for the use and occupation of the bankrupt, but only for their own.

Naish v. Tatlock, 2 H. Black. 319.

But the bankrupt is liable on his *agreement* to pay rent, notwithstanding his bankruptcy, and though the assignees have occupied during part of the time for which the rent is claimed.

Boot v. Wilson, 8 East, 311.

Executors and administrators cannot in general reject the term of their testator or intestate, as the assignees may that of the bankrupt; but where an administrator has merely taken possession of premises demised to his intestate, and endeavoured to let them, and has offered within a reasonable time to surrender the term to the landlord, and has made no profit of the term, and has no assets, he cannot be charged in an action for use and occupation subsequent to the intestate's death; and the above facts are a good defence on *non assumpsit*.

Remnant v. Bremridge, 2 B. Moo. 94; and *vide* 1 Will. Saund. 1, n. (1).

So, also, where a woman *dum sola* was tenant of premises at a yearly rent, and in the middle of a half-year she married, having previously given notice to determine the tenancy at the end of the half-year, it was held that the landlord could not recover that half-year's rent in an action against the husband for use and occupation. This case was attempted to be distinguished from *Naish v. Tatlock*, since the assignees there were not liable to the debts of the bankrupt, whereas the husband by the marriage takes upon him the debts and contracts of the wife; but the court thought it was the same thing as if the occupation had been by a stranger, instead of the wife.

Richardson v. Hall, 1 Bro. & B. 56; and *vide* *Whitehead v. Clifford*, 5 Taunt. 518; *sed vide* 2 Camp. R. 104.

If the tenant with the landlord's assent quit in the middle of a quarter, the landlord cannot recover for use and occupation for the whole quarter, nor *pro rata* for that part of it during which the occupation continued; and if the tenant at the end of the year quit without notice, and the landlord before the next half-year expires let the premises, he cannot recover for use and occupation from the end of the year till the time of re-letting.

Grimman v. Legge, 8 Barn. & C. 324; *Hall v. Burgess*, 5 Barn. & C. 332.

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Where a lease for years expired at Midsummer, and the tenant refused to give up possession of the premises, insisting that he was entitled to notice to quit, and afterwards continued in possession till Christmas, and paid rent to that time, when he tendered the keys of the premises to the landlord, which the latter refused to take; it was held that this was not a holding over, but conclusive evidence of a tenancy from year to year, which enabled the landlord to maintain use and occupation for a quarter's rent due at Lady-day.

Bishop v. Howard, 2 Barn. & C. 100.

Where premises were held under an agreement for a certain term, the landlord was held entitled to recover the rent in this action, notwithstanding the building had been previously burnt down, and the premises were afterwards uninhabited, for the *land* still remained in his occupation.

Baker v. Holtzapfel, 4 Taunt. 45; *sed vide Edwards v. Etherington*, 1 Ry. & Moo. 268.

And the landlord may support this action against the original tenant, although the premises are in the occupation of an under-tenant.

Bull v. Sibbs, 8 Term R. 327.

But if the landlord accept of the under-tenant, and distrain upon him for rent, he cannot afterwards proceed for use and occupation against the original tenant.

Thomas v. Cook, 2 Barn. & A. 119; *Walls v. Atcheson*, 3 Bing. 462; *Hall v. Burgess*, 5 Barn. & C. 332.

And if the landlord after an underletting of the premises give notice to the under-tenants to quit, and they do quit, and the premises remain unoccupied for a year, after which they are again underlet by the tenant, the landlord cannot recover that year's rent in an action for use and occupation against the tenant; for it is an eviction on the part of the landlord.

Burn v. Phelps, 1 Stark. 94.

And if lands are let to A, and B agree with the landlord to stand in A's place and to pay rent, the landlord may afterwards sue B for use and occupation, and B cannot set up A's interest as a defence, although it has never been determined by surrender or notice to quit; for this would be disputing his landlord's title, which is never allowed in this more than in other actions for rent.(a)

Phipps v. Sculthorpe, 1 Barn. & A. 59; *sed vide* 8 Taunt. 270; 2 Stark. 419; *Bull. N. P.* 139; 1 Wils. 314. (a) But although a tenant cannot dispute the title of the person under whom *he enters*, yet after acknowledging the title of a person by payment of rent, the tenant is not precluded from showing that such person has no title, and that the payment was made under a mistake. *Rogers v. Pitcher*, 6 Taunt. 202; *Williams v. Bartholomew*, 1 Bos. & Pul. 326.

Therefore, in an action of use and occupation by a parson against a tenant of his glebe, the tenant cannot avoid his title by showing a simoniacal presentation.

Cooke v. Loxley, 5 Term R. 4; and *vide* 1 Esp. Ca. 21.

If, however, the tenant has notice of the conveyance of the reversion by his landlord, he cannot afterwards safely pay the rent to him, and the new landlord may bring use and occupation for such rent, without any attornment by the tenant, under the stat. 4 & 5 Ann. c. 16, § 9 & 10; and notice of the title of the beneficial owner (though only a *cestui que trust*) is sufficient to enable his trustees, in whom the legal estate is vested, to maintain this action against the tenant.

Lumley v. Hodgson, 16 East, 99.

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In a case, however, where the defendant held a copyhold tenement under the plaintiff, and had paid him rent within two years, it was held by Lord Ellenborough that he could not, in an action for use and occupation, set up as a defence, that, two years before, the tenement had been regularly seized as forfeited to the lord of the manor by process from the court baron, that the tenant had received notice to pay the rent to the lord, and had paid it to him ever since.^(a) Lord Ellenborough thought the tenant ought, on the seizure, to have disclaimed holding of the plaintiff, and to have entered afresh under the new landlord.

Balls v. Westwood, 2 Camp. 11. (a) *Qu.* whether the seizure of the tenement could be considered a grant or conveyance of the reversion within the meaning of the 4 & 5 Ann. c. 16, § 9, 10? If it could, then, as the tenant had notice of it, he could not resist the payment of the rent to the lord, and consequently could not be liable to pay it again to the plaintiff. The above statute takes away the necessity of attornment, but provides that the tenant shall not be prejudiced by paying rent to the old landlord, as long as he has *no notice* of the title of the new. *After* he has such notice he becomes liable to the new landlord without any disclaiming of the old one, or any fresh entry. And if he becomes liable to the new landlord, it must follow that he is discharged as to the old one. And see *Lumley v. Hodgson*, *suprà*.

Where the defendant did not come in under the plaintiff, so as to be stopped from controverting his title, it seems the plaintiff can only recover in respect of the legal estate, and not of an equitable one. Therefore where the defendant entered under a landlord, who soon after mortgaged his estate to W S, and afterwards assigned the equity of redemption to the plaintiff, and the plaintiff afterwards took an assignment of the legal estate from W S, Lord Ellenborough held that the plaintiff could only recover for the use and occupation subsequent to the legal estate becoming vested in him, and not for the period during which he had only the equity of redemption.

Cobb v. Carpenter, 2 Camp. 13, n.

The action, it seems, will lie for the rent of a Jewish synagogue, there being no express law prohibiting such establishments.

2 Stark. 356.

But it will not lie for use and occupation of premises let for the purpose of prostitution.

1 Esp. Ca. 13; 1 Bos. & Pul. 340, n.

The action may be maintained by a corporation aggregate.

Dean and Chapter of Rochester v. Pearce, 1 Camp. 465; *Mayor of Stafford v. Till*, 4 Bing. 75.

β *Assumpsit* for use and occupation will not lie against the assignee of a lease under seal.

Blume v. M'Clurker, 10 Watts, 380.*g*

Where premises had been demised by two tenants in common, and the rent for a time paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was paid accordingly, and separate receipts given; in an action for use and occupation by the two, it was held a question for the jury, whether or not it was the intention of the parties to enter into a new contract, with a separate reservation of rent to each.

Powis v. Smith, 5 Barn. & A. 850.

Where a lessee took a farm under an agreement which he never signed, and the terms of which, in a material point, the lessor failed to fulfil, it

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was held, in an action for use and occupation, that the jury might ascertain the value of the land without regarding the rent reserved by the agreement.

Tomlinson v. Day, 2 Bro. & B. 680; 5 Moo. 558, S. C.

§ The defendant, a tenant for years, left the premises in the middle of a year, and sent the key to the landlord, who sent notice to the tenant that he should continue to hold him liable for the rent, and then the landlord took possession and offered the house to let; in an action for use and occupation, held, that the landlord might recover from the tenant the amount of rent which accrued between the time of his leaving the house and the time that it was again rented.

Marseilles v. Kerr, 6 Whart. 500.

A person who had agreed to a parol lease of a house for a year, and undertaken to procure the possession from a former lessee, was held liable in action for use and occupation, though he had refused to take possession, alleging that he rented for another person.

M'Gunnagle v. Thornton, 10 Serg. & R. 251.

To render the defendant liable in an action for use and occupation, it is not requisite that he should actually have held the possession the whole time laid in the declaration, if he became a tenant by the contract, and retained the control and command of the property under such contract.

Grant v. Gill, 2 Whart. 42.

Where there is an agreement to demise a house for five years, and leases to be executed, under which the party enters, and subsequently refuses to accept a lease, the owner may maintain *assumpsit* for use and occupation.

Little v. Martin, 3 Wend. 219.

When a tenant enters upon land under a lease from one in possession claiming title, and the lessor is afterwards evicted by one having a better title, there is no such privity between the lessee and the owner as to give the latter an action against the lessee for use and occupation.

Fletcher v. M'Farlane, 12 Mass. 43. See Codman v. Jenkins, 14 Mass. 93; Allen v. Thayer, 17 Mass. 299.

Where a mortgagor redeems mortgaged lands, he cannot maintain *assumpsit* for use and occupation against the mortgagee for rent during the time he was in possession, although the latter in his account for the mortgage debt credits nothing for the rent, and the mortgagor pays the whole debt without deduction; his remedy is an action for money had and received for the amount overpaid.

Wood v. Felton, 9 Pick. 171.

One who occupies land under a contract for a purchase is not liable to an action for use and occupation, if the owner fails to execute a conveyance to him.

Little v. Pearson, 7 Pick. 301.

Where the defendant occupied apartments of the plaintiff, and after complaints made of nuisances, which the jury found to be such as to render the occupation uncomfortable, and the defendant quitted *bond fide* for such reason; held, that the plaintiff could not recover for use and occupation for the time between the quitting and the period at which the notice expired.

Cowie v. Goodwin, 9 C. & P. 378.

(K) Remedies for Rent. (*Payment on Execution.*)

Where a defendant entered into possession of the premises under an agreement for the purchase, which afterwards went off, held, that from that time he was to be deemed a tenant at will, and liable for the occupation.

Howard v. Shaw, 8 Mees. & W. 118.

Where lodgings had been let at a rent payable quarterly, and the premises were afterwards burnt down; held, that on an action for use and occupation, the landlord was entitled to the rent accruing from the last quarter to the time of the fire taking place.

Packer v. Gibbins, 1 Gale & D. 10.

Where the defendant was entitled to enter into possession of the premises under an agreement of demise, and he had obtained the key of the former tenant, and employed a person to clean the papering; held, sufficient to authorize the jury to find an occupation in assumpsit for use and occupation.

Smith v. Twoart, 3 Scott, N. S. 172.

Where the defendant became the tenant of premises for nine months certain, and then to have a lease at his option for seven, fourteen, or twenty-one years, and before the expiration of the nine months, he underlet to parties for six months, who continued to occupy by their machinery, &c.; held, that after the end of a year after the nine months had expired, the defendant was liable for use and occupation for the year's rent.

Waring v. King, 8 Mees. & W. 571.

8. *Of the Remedy by Payment of the Sheriff, on an Execution against Tenant's Goods.*

By the stat. 8 Ann. c. 14, § 1, it is enacted, that no goods or chattels, in or upon any messuage, lands, or tenements, leased for life, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out, shall, before removal of the goods from the premises by virtue of such execution or extent, (a) pay to the landlord or his bailiff such sums as are due, for rent of the premises at the time of taking such goods or chattels under the execution, provided the arrear do not exceed one year's rent; and in case the arrears exceed one year's rent, then one year's rent is to be paid to the landlord, and the sheriff or other officer is thereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money.

(a) This does not apply to an extent at the suit of the Crown. *Rex v. De Caux*, 2 Price, 17; *Rex v. Hill*, 6 Price, 19.

The eighth section provides, that nothing shall extend to prejudice her majesty, her heirs or successors, in levying debts, fines, or penalties, due to her majesty, &c., but that it shall be lawful for her majesty, &c., to levy and recover such debts, &c., as if the act had never been made.

This act has received a liberal construction, and is held to extend to executions by the defendant for costs, as well as executions for the plaintiff.

Henchett v. Kimpson, 2 Wills. 140.

And on the equity of the statute the landlord is entitled to his rent on a sequestration out of chancery.

Dixon v. Smith, 1 Swanst. 457.

Although the words of the statute seem to impose on the party, at whose suit the execution issues, the duty of paying the rent to the landlord, yet

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the sheriff is responsible to the landlord; and the bailiff of a liberty is within this act.

Palgrave v. Windham, 1 Stra. 212.

It seems, however, that he is not bound to find out the landlord, but that the landlord must give notice to the sheriff of the rent being due, and make a demand before the removal of the goods.

Smith v. Russell, 3 Taunt. 400. β The landlord must give notice before the execution is returned, or he will be postponed. *Mitchell v. Stewart*, 13 Serg. & R. 295. But it is not necessary that it should be given before the return day, if the sheriff have not paid over the money. *Ege v. Ege*, 5 Watts, 134. See *Allen v. Lewis*, 1 Ashm. 184; *Alexander v. Mahon*, 11 Johns. 185; *Miller v. Johnson*, 12 Wend. 197; *Beekman v. Lansing*, 3 Wend. 446. γ

And therefore where the landlord had died intestate, with an arrear of rent due to him, and an execution was levied on the tenant's goods, and afterwards the administrator took out administration, and then moved the court to have a year's rent out of the levy-money; the court held him not entitled, since no demand was made, or could have been made, on the sheriff, as the administration was not granted till after the removal, and therefore there was no landlord to make the demand.

Waring v. Dewberry, 1 Stra. 97.

If, however, notice be given to the sheriff at any time while the goods, or the proceeds, remain in his hands, he is bound to retain the rent, although the goods were removed from the premises before the notice. And if the sheriff have knowledge that rent is due, it is the same thing as if an express notice be given him by the landlord.

Arnitt v. Garnett, 3 Barn. & A. 440, 645; β *Allen v. Lewis*, 1 Ashm. 184. See *Miller v. Johnson*, 12 Wend. 197; *Beekman v. Lansing*, 3 Wend. 446. γ

The want of *alleging* a demand seems to be helped by verdict.

Stra. 214.

And an action lies by an administrator or executor against the sheriff for an arrear of rent accrued due to the intestate or testator.

1 Stra. 214.

The statute only extends to immediate landlords, and not to ground landlords.

Master Bennet's case, 2 Stra. 787; β *Bromley v. Hopewell*, 2 Miles, 414. γ

Where, in an agreement for sale, it was stipulated that, until the assignment was made, the purchaser should pay to the seller 100*l.* per annum from the time of taking possession till the completion of the purchase, this was held to constitute the relation of landlord and tenant, and the seller was held entitled to his rent under the statute, on an execution against the purchaser.

Saunders v. Musgrave, 6 Barn. & C. 52.

Only one year's rent is to be paid, though there are two executions.

Dod v. Saxby, 2 Stra. 1024.

A bill of sale has been ruled to be a removal within the statute.

Barnes, 211.

The landlord's rent is to be paid without deduction for sheriff's poundage.

1 Stra. 643. β If the tenant agrees to pay rent without any deduction on account of taxes, which he covenants to pay, the landlord cannot charge the goods taken in execution with any part of the sum due for taxes. *Binns v. Hudson*, 5 Binn. 505. See as to

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taxes, *Cram v. Monro*, 1 Edw. R. 123; *Gouverneur v. Mayor of New York*, 2 Paige, 435.g

β If the proceeds of the goods taken in execution, when sold, are not sufficient to pay the rent due and the sheriff's costs, the latter is entitled to retain to the amount of his costs.

Henniss v. Streeper, 1 Miles, 269.g

The landlord is only entitled to the rent due at the time of the taking the goods, and not to rent accruing during the sheriff's possession.

Hoskins v. Knight, 1 Maul. & S. 245; *Gwillim v. Barker*, 1 Price, 274, and 6 Price, 19; β *Binns v. Hudson*, 5 Binn. 505; *West v. Sink*, 2 Yeates, 174; *Bank of Pennsylvania v. Wise*, 3 Watts, 404; *Lichtenthaler v. Thompson*, 13 Serg. & R. 158. See *Gray v. Wilson*, 4 Watts, 39. It seems that the landlord can claim only for the *current year*, and not for any previous time. *Lichtenthaler v. Thompson*, 13 Serg. & R. 157.g

The landlord is entitled to the benefit of the statute for the recovery of forehand rent payable in advance by the lease.

Harrison v. Barry, 7 Price, 690.

A commission of bankrupt is not an execution within this statute. Therefore where a sheriff had seized the goods of a bankrupt, after the act of bankruptcy, on an execution at the suit of the landlord, who was also a judgment creditor of the bankrupt, and the sheriff sold the goods after a commission issued, and out of the proceeds paid a year's rent to the landlord; it was held, that as the sheriff did not show that he had no notice of the commission before he paid the rent, he was liable in an action for money had and received to pay the whole proceeds of the levy to the assignees; and that he could not deduct the amount of the rent, as the landlord was not entitled to it under the statute, since the statute only applied to *executions on judgments*. The landlord in this case should have distrained for the rent, instead of relying on his judgment and his claim under the statute; for a commission, not being an execution, does not deprive the landlord of the power of distress, as an execution does; and as long as the goods of the bankrupt remain on the premises the landlord may distrain,^(a) although after an assignment to the assignees and a sale.

Lee v. Lopez, Bt., 15 East, 230; and vide 2 Term R. 600; *Ex parte Plummer*. 1 Atk. 103. (a) But now by 6 G. 4, c. 16, § 74, no distress after an act of bankruptcy, whether before or after the commission, shall be available for more than one year's rent accrued prior to the commission, but the landlord may come in as a creditor for the residue.

The landlord is entitled to his rent on an outlawry in a civil suit against the tenant, for a *capias utlagatum* at the suit of the party is only a private execution.

St. John's Coll. v. Murcott, 7 Term R. 259.

But where goods were seized on a *pone per vadios*, out of the court of Durham, and the goods were forfeited to the bishop by reason of the defendant's default, it was held that the case was not within the statute, and the landlord was not entitled to his year's rent.

Brandling v. Barrington, 6 Barn. & C. 467.

The action against the sheriff, for not retaining the rent pursuant to notice, may be supported by the trustees of an outstanding term, assigned in trust to attend the inheritance; although their *cestui que trust* was the person beneficially interested as landlord.

Colyer v. Speer, 2 Bro. & B. 67.

(L) Rent how discharged. (*Eviction.*)

Where a *fieri facias* issued against the goods of a tenant, and whilst the sheriff was in possession under it, a writ of *habere facias possessionem* was delivered to him in an ejectment at suit of the landlord, in which the demise was laid long antecedent to the issuing of the *fieri facias*; it was held that the landlord was not entitled to his year's rent out of the levy-money, since the statute contemplated an *existing* tenancy, whereas the tenancy here was at an end on the day of the demise in the ejectment, from which time the tenant was a trespasser.

Hodgson v. Gascoigne, 5 Barn. & A. 88.

If the landlord accept an undertaking from the sheriff to pay the rent, and consent to the removal of the goods, he has waived his remedy on the statute; and this, whether the undertaking be valid or invalid as a contract.

Rothery v. Wood, 3 Camp. 25.

The landlord cannot recover the rent in an action for money had and received against the sheriff, but his remedy is by a special action on the case.

Green v. Austin, 3 Camp. 260.

If the goods have been removed by the sheriff without paying the rent, the sheriff is not discharged by returning them again to the premises, for they are still *in custodia legis*, and not liable to distress.

Lane v. Crockett, 7 Price, 566; and vide *Ibid.* 690.]]

§When the rent is payable quarterly, and the tenant's goods are taken in execution, the landlord, in New York, is not entitled to the current quarter.

Hazard v. Raymond, 2 Johns. 478.g

(L) Rent when and how discharged; and herein, of the Eviction of the Tenant.

§THE following, as to how arrears of rent may be discharged, are extracted from Hammond's *Nisi Prius*, 431 to 433.

1. They will be satisfied by a *payment* at any *time* of the day whereon they are reserved, or at a future period; but payment before the day will not suffice; for such render is but of a sum in gross, whereas rent is something real.(a)

(a) 4 Leon. pl. 16, page 4.

2. Although the land is the proper *place* of payment, unless some other is pointed out, yet if the lord accepts the rent off the land, it is thereby discharged.

3. The payment may be *simple*, nor is an *acquittance* necessary.

4. The mere *acceptance* of *rent due* the *last day* of payment, will not amount to an acknowledgment that *former arrears* have been satisfied. Nor, if the landlord avows in a court of record for the sum due at the subsequent day, will a previous arrear be thereby cancelled. But, an *acquittance* under seal for the subsequent arrear will have this effect.(b)

(b) 3 Rep. 65, Pennant's case; Moore, pl. 219, p. 87; 1 Lev. 42; Palmer v. Stanage, Comb. 59.

5. If the rent is paid to a *stranger*, who demands it without authority in the name of the lord, and the *lord* afterwards *recognises* the act of the stranger, this has the effect of making him bailiff *ab initio*.

6. The right to rent arriere is vested in him, who has (if the phrase may be allowed) possession of the seignory or reversion to which it is incident at the time it becomes due, even though he acquired it by wrong. So that if A is disseised of a manor, and the tenants pay their rent which after-

(L) Rent how discharged. (*Eviction.*)

wards falls due to the *disseisor*, A when he afterwards re-enters, cannot oblige them to pay it over again, but his only remedy is an action against the disseisor.(a) Though, if payment has not been made to the latter, A will be entitled to the arrears; for his case, after he has re-possessed himself of the land, is the same as if he had never lost possession; and the operation of this doctrine is suspended in the instance just mentioned, in order that injustice might not ensue to innocent third persons.

(a) Keilw. 2, ca. 2.

7. Payment of rent to one of several *parceners* or *joint-tenants* is payment to all.(b) But it seems a tenant, holding under *tenants in common*, cannot pay the whole rent to one of them, after notice from the others to withhold it.(c)

(b) 2 Rep. 68, Tooker's case. If one of several parceners or joint-tenants die, the entire sum of the arrears will survive to the others. 2 Roll. Abr. 86, (B.) pl. 1. (c) 5 T. R. 246, Harrison v. Barnby.

8. Formerly, if the reversioner, when the tenant's estate was a *freehold* interest, died, the rent being arrear and the tenure continuing on, his *personal representative* was not entitled to claim the amount due until the expiration of the tenure, because the arrears are till that event things real, and therefore did not belong to the personal estate. Now, however, the statute of Henry the Eighth (d) has given such representative a right to demand them immediately on the reversioner's death.

(d) 32 Hen. 8, c. 37. Vide post.

9. There can be no *apportionment of rent* in respect of *time*; so that, if the reversion has been aliened before the rent-day, the entire rent when arrear will be due to the alienee.(e)

(e) If a tenant at will determines his estate before the rent-day, yet he shall pay the whole sum which would have been payable had he continued tenant till after the day. Aleyn, 4, Bowes' case. Vide 1 Brownl. page 89. If the lessor himself determines the will before the day, nothing will be due.

10. By an act of parliament, the tenant is empowered to deduct from the rent the amount of *property tax* due from the lord in respect of the premises holden, and pay it over to the collector, and the production to the lord of the collector's receipt is conclusive evidence of such payment.(g)

(g) The tenant may pay a ground rent to the original or paramount landlord, and deduct such payment from the amount of the rent due from him to his own lessor. 4 T. R. 511, Sapsford v. Fletcher.

11. Where the rent itself is extinguished by act of the lord, as by his *releasing* to the tenant the duties annexed to the tenure, though the tenure still remains, yet the arrears incurred before the release are *qua* rent extinguished. So likewise, if the *tenure* is *determined*, the arrears of duties arising out of it cease to be things real, and become mere personal chattels.

12. The lord may, by his *release*, extinguish the *arrears* of rent; but they are not discharged by his accepting *accord* and *satisfaction* in lieu thereof, because this is a thing personal, and therefore cannot merge and extinguish a demand arising out of the realty.(h)

(h) 6 Rep. 44, Blake's case.g/

[A rent-service is something given by way of retribution to the lessor for the land demised by him to the tenant; and, consequently, the lessor's title to the rent is founded upon this, that the land demised is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for a thing he has not: if therefore the tenant be deprived of the thing

(L) Rent how discharged. (*Eviction.*)

letten, the obligation to pay the rent ceases, because such obligation has its force only from the consideration, which was the enjoyment of the thing demised. Hence, then, we may gather these conclusions or inferences.

Gilb. on Rents, 145.]

If the lands demised be evicted from the tenant, or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction; but, notwithstanding such recovery or eviction, the tenant shall pay the rent that became due before the recovery; because the enjoyment of the land being the consideration for which the tenant was obliged to pay the rent, so long as the consideration continued the obligation must be in force; there being the same reason that the tenant should pay the rent for part of the time contracted for, as for the whole term, if he had enjoyed the land so long.

2 Roll. Abr. 429; Hob. 82; Cro. Eliz. 47; Co. Lit. 148, 201.

So, if a disseisor makes a lease for years, rendering rent, and afterwards the disseisee enters, and (a) ousts the lessee, yet the lessee shall be accountable for the rent incurred before the *ouster*; because the lessee cannot be taken for a trespasser, since he came into the lands under the sanction of a legal contract; though the disseisor, having but a defeasible title, could not perform that contract; however, till it was destroyed, and while the lessee had the peaceable enjoyment, the obligation to pay the rent, which was founded on the enjoyment, must continue, and, consequently, the lessee be obliged to pay the rent till the entry of the disseisee.

2 Roll. Abr. 429. (a) Must be an actual ouster. 1 Ld. Raym. 370. [It must be so pleaded: a plea of mere entry by the lessor, or destruction by him of part of the premises, without alleging an actual expulsion, is not sufficient; for these are simple trespasses. Hob. 326. Reynolds v. Buckle, Cowp. 242. Hunt v. Cope, 2 Jon. 148. Roper v. Loyd.]

For the same reason, if part only of the land letten be evicted from the tenant, such eviction is a discharge of the rent in proportion to the value of the land evicted.

10 Co. 128 a; Dyer, 56; Roll. Abr. 235. {If the *assignee* of the lessee is evicted from one moiety of the land by title paramount, the rent shall be apportioned in an action of *covenant* brought against him by the lessor, as well as in debt, or on an *avowry* in replevin; for covenant against the assignee is founded on the *privity of estate*, he being chargeable only in respect of the land, because the covenant runs with the land. But in covenant between lessor and lessee, where the action is personal and upon mere *privity of contract*, the rent is not apportionable. 2 East, 575; Stevenson v. Lambard.}

¶ If the lessor be evicted of a part of the land demised, by a stranger on title paramount, it operates as a suspension of the rent *pro tanto*, and the rent is apportionable and payable only in respect of the residue.

Poston v. Jones, 2 Iredell, 350. As to what will amount to an eviction, see Ogilvie v. Hall, 5 Hill's R. 53.¶

If A lets several lands to B, and afterwards the inhabitants of the town, where part of the lands lie, recover a right of common in part of the lands demised; this recovery, it seems, by the strict rules of the common law, shall make no apportionment of the rent; because the recovery of the common is no eviction of the land, for the soil still remains in the lessee; and therefore there can be no apportionment. But a court of equity considers that the lessee can have little benefit by the soil itself, while others are permitted to take the profits in common with the lessee, and therefore in such cases have apportioned the rent; unless it appears, that, notwith-

(L) Rent how discharged. (*Eviction.*)

standing such right of common recovered, the lands demised are well worth the rent reserved upon the lease.

Ch. Ca. 31, 32, *Jew v. Tirkwell*; 3 Ch. Rep. 12.

But the former cases are to be understood with this restriction, that if the tenant be ousted by a title paramount, before the day appointed for the payment of the rent, such eviction entirely discharges the tenant from the payment of any part of the rent. For instance, if A, lessee for life, makes a lease to B for years, rendering rent, payable at Easter, and B by virtue of the lease enjoys the land for nine months, and then A dies, by which the interest of B is determined; in this case, B shall pay no rent at all; for though he held the land for nine months, yet his lease being ended before the expiration of the year, (for the rent being made payable at Easter only, was payable but once in a year,) there could be no rent due by the contract, for it was in consideration of the enjoyment of the land that the lessee was by the contract obliged to pay the rent at the expiration of the year; and when the enjoyment is interrupted and destroyed, the lessee shall not be obliged to pay for what he had not; nor can there be any apportionment, because by the express words of the lease it was to be paid at Easter, and not before. (a)

10 Co. 128; Salk. 65, pl. 1; 1 P. Wms. 392, pl. 105. (a) But now, by the stat. 11 G. 2, c. 19, § 15, at the death of tenant for life, a proportionable part of the rent shall be paid to the executor. Vide the stat. *infra*.

||And there shall never be an apportionment in respect of part of the time, as there shall be upon an eviction of part of the land.

10 Coke, 128.||

As the tenant is discharged from the payment of the rent when the land is evicted by a title paramount, so, by a parity of reason, he shall be discharged from it when the lord purchases the tenancy; for in such case the lord cannot have both the land and the rent, nor shall the tenant be under any obligation to pay the rent, when the land, which was the consideration, is resumed by the lord into his own hands; and this resumption, or purchase of the tenancy by the lord, makes what the law books call an extinguishment of the rent.

Vaugh. 199; Pollex. 142.

But, if the conveyance to the lord was not absolute, but upon condition, or, if it were only of a particular estate of shorter duration than the estate which the lord had in the rent-service; in these cases, though there be an union of the tenancy and the rent in the same hand, yet, because that union is but temporary, (for, upon the performance of the condition or determination of the particular estate, the tenant is restored to the enjoyment of the land, and, consequently, the obligation to pay the rent revives;) therefore the rent in such case is only suspended, and not extinguished.

Bro. tit. *Extinguishment*, (17); Vaugh. 39, 199; Pollex. 142.

ℳ When the defendant occupied as yearly tenant, at a rent payable half yearly, in April and October, and the premises being required by a railway company, who under their act were authorized to take the premises on giving six months' notice; they gave such notice, and it expired on the 28th of July, and the defendant quitted without requiring compensation; held, that he remained liable to the landlord for the remaining period up to October, as he might have refused to have quitted without compensation for his interest in the premises.

Wainwright v. Ramsden, 5 Mees. & W. 603.℄

(L) Rent how discharged. (*Eviction—Purchase.*)

By the 11 Geo. 2, c. 19, reciting, that, whereas, if any lessor or landlord, having only an estate for life in the land, &c., dies before or on the day on which any rent is reserved or made payable, such rent, or any part thereof, is not recoverable by the executors, &c., of such lessor; nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, &c., from the death of the tenant for life; of which advantage hath been taken by the under-tenants, who thereby avoid paying any thing for the same; for remedy whereof it is enacted, That where any tenant for life shall die before or on the day on which any rent was reserved, or made payable on any demise or lease of any lands, &c., which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, &c., if such tenant for life die on the day on which the same was made payable, the whole; or if before the day, then a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, or other time, in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively.

11 G. 2, c. 19, §15. ¶Vide *antè* p. 501.]

[Where rent was so granted, as that upon some contingency happening there was no one who could take by the grant, in such case the rent was said to be *determined*, for it could not properly be said to be extinguished or suspended, these terms being only applicable when there is an union in the same person, either absolute or temporary, of the rent and the land out of which it issues. A determination of it happened, when rent was granted to one *pur auter vie*, and the tenant *pur auter vie* died in the lifetime of *cestui que vie*: here, as there could be no general occupancy of a rent, and no special occupant was marked out, it determined upon the death of the grantee. So, where a rent was granted to one, his executors, administrators, and assigns, and the grantee died in the lifetime of the tenant *pur auter vie*, it was holden that it did not go to the executor, being a freehold which he was incapable of taking, and therefore where there was no assignment, determined by the death of the grantee. But where rent was granted to one and his heirs *pur auter vie*, and the grantee died in the lifetime of *cestui que vie*, leaving an heir, in such case the rent is not determined, but goes to the heir as a special occupant.(a) This question, however, with respect to the determination of rents by occupancy, is now universally prevented by two statutes, viz.: the 29 Car. 2, c. 3, §2, which makes estates *pur auter vie* devisable, and if not devised, chargeable in the hands of the heirs as assets, if he takes them as special occupant; and if he does not, directs that they shall go to the grantee's executors and administrators, and be assets in their hands; and the 14 G. 2, c. 20, §4, which in the case of intestacy makes the surplus of such estates distributable.

Holder v. Smallbrooke, Vaugh. 199; 3 P. Wms. 264, (D); Salk. 189; 2 Roll. Abr. 150; Moo. 664; Cro. El. 901; Yelv. 9; Noy, 48. But see 3 Atk. 466, where Lord Hardwicke thought that executors, if named in the grant, might have taken an estate *pur auter vie*, though a freehold before the statute of 29 Car. 2; Co. Lit. 41 b, n. 3, 4, 5, (17th edit.) (a) Ld. C. J. Vaughan thought that there could be no occupancy, either general or special, of a rent, and therefore that the heir took in this case by descent as heir of a descendible freehold. But see the notes in Co. Lit. above referred to;] ¶and see Doe v. Robinson, 8 Barn. & C. 296.]

(M) Of Apportionment,(a) and herein of the Suspension and Extinguishment of the Rent: And therein,

1. *In what Cases a Rent may be apportioned by the Act of the Parties; and herein of the Difference between a Rent-Service and a Rent-Charge.*

AND first, it is necessary to distinguish between a rent-service and a rent-charge: for if a man, who hath a rent-service, purchases part of the land out of which the rent issues, the rent-service is not extinguished, but shall be apportioned according to the value of the land; so that such purchase is a discharge to the tenant for so much of the rent only as the value of the land purchased amounts to: but if a man has a rent-charge, and purchases part(b) of the land out of which the rent issues, the whole rent is extinguished.

(a) Vide the stat. 11 G. 2, *anté*, 516. Lit. § 222; 8 Co. 105 b; Gilb. on Rents, 151; ¶where the reason of the difference between a rent-service and a rent-charge in this respect is explained.¶ β Rent-charge is a rent where the lessor has no reversionary interest. *Cornell v. Lamb*, 2 Cowen, 652; *The People v. Haskins*, 7 Wend. 463; 7 Sav. 69. (b) *Noy*, 5. The terre-tenant must plead this, in order to exonerate the remainder.

But if the grantor, by deed reciting the purchase, had granted that the grantee should distrain for the same rent in the residue of the land, the whole rent-charge had been preserved; because such power of distress had amounted to a new grant.

Co. Lit. 147, 148; Roll. Abr. 236.

If a man grants a rent-charge out of two acres, and afterwards the grantee recovereth one acre by title paramount the grant, the whole rent shall not be extinguished; because the law, which gives the remedy for the recovery of a man's right, will not prevent the prosecution of such right, by depriving the prosecutor of a greater profit than the thing recovered may amount to; but, in this case, there shall be no apportionment, but the grantee shall have the whole rent after he has recovered one acre.

Co. Lit. 148 b. Where entire services, as a horse, hawk, &c., shall be extinguished or revive, vide 6 Co. 1, 2; Co. Lit. 149; 8 Co. 105.

In some cases a rent-charge may be apportioned by the act of the party, as, if the grantee releases part of his rent to the tenant of the land, such release does not extinguish the whole rent. So, if the grantee gives part of it to a stranger, and the tenant attorns, such grant shall not extinguish the residue which the grantee never parted with, because such release or disposition makes no alteration in the original grant, nor defeats the intention of it, as the purchase of part of the land does; for the whole rent is still issuable out of the whole land, according to the original intention of the grant. Besides, since the law allowed of such sort of grants, and thereby established such sort of property, it would have been unreasonable and severe to hinder the proprietor to make a proper distribution of it for the promotion of his children, or to provide for the contingencies of his family, which were in his view. The objection that has been made to these sort of apportionments, or divisions of rent-charges, is this, that the tenant thereby would be exposed to several suits and distresses for a thing, which, in its original creation, was entire and recoverable upon one avowry.

Co. Lit. 148. Vide Cro. Eliz. 742, which seems contrary. [Hobart *arguendo* observes, that the tenant is not compellable to attorn, and Lord C. B. Gilbert, in his treatise on this subject, 165, seems of the same opinion; but see the next page, and]

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quere, whether by the stat. 4 Ann. c. 16, § 9, such grants be not good without the attornment of the tenant?—* * That is, so as to affect the tenant. By 11 G. 2, c. 19, § 11, attornment by tenants, unless made in consequence of some judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord, or to any mortgagee after the mortgage is become forfeited, are void.* *

And if a rent-charge may partly be assigned by the grant of the party, much more may part of it be extended for his debts, by the favour and assistance of the law; for though the tenant is thereby, without his attornment, possibly made liable to several suits and distresses, yet it is an inconvenience he may avoid by a punctual performance of his own grant.

Cro. Eliz. 742, Wotton v. Shirt.

It is next to be considered, whether a rent-service, incident to the reversion, may be apportioned by the grant of part of the reversion. And it seems formerly to have been doubted whether upon such grant there could be any apportionment? or whether the whole rent should not be extinguished and lost? for since the reversion and rent incident thereto were entire in their creation, they thought it hard that by the act of the lessor they should be divided, and thereby the tenant made liable to several actions and distresses for the recovery of them. But this conception was too narrow and absurd to govern men's property long; for if I make a lease of three acres, reserving 3s. rent, as I may dispose of the whole reversion, so may I also of any part of it, since it is a thing in its nature severable, and the rent, as incident to the reversion, may be divided too; because that being given in retribution for the land, ought, from the nature of it, to be paid to those who are to have the land upon the expiration of the lease; and hence it is, that the rent passes incidentally with the reversion without any express mention of it in the grant; but the tenant has really no prejudice from such grant, because it is in his power, and it is his duty to prevent the several suits and distresses by a punctual payment of the rent; and therefore he ought not to complain of a mischief which he has wilfully brought upon himself. Besides that formerly such grants could not take effect without the attornment and consent of the tenant. But, on the other hand, it would be extremely prejudicial, if upon such grants the rent should not be apportioned; because then the lessor could not out of his property make a provision for his younger children, or answer the contingencies of his family he may have in view.

2 Inst. 504; Roll. Abr. 234; Cro. Eliz. 651, 851; Co. Lit. 148 a; 8 Co. 79 b; Dy. 326; Hob. 177; 13 Co. 57, 58; Moor, pl. 255, 260. [And it is settled that the assignee of the reversion of *part* of demised premises may sue upon the covenants in the lease, although he cannot take advantage of a condition. Twynam v. Pickard, 2 Barn. & A. 105.] § A reversioner may sell his estate in parts to different persons, each of whom will be entitled to a separate portion of the rent; or, if the reversioner die, having several children, his estate will descend to them by operation of law, and each will be entitled to his share. Bank of Pennsylvania v. Wise, 3 Watts, 394. g

And upon this reason the apportionment of rent has been carried a step farther: as, if A, possessed of a term for twenty years, leases it for ten years, reserving 30l. rent, and afterwards A devises 20l. of the rent to three of his sons equally to be divided, this is a good devise, and each of the sons shall have an action of debt for his third part, though the reversion, to which the rent was originally incident, remains entire; for there is nothing in the nature of the thing to hinder such a division or apportionment; and if the tenant omits to pay the rent, the several actions are a

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mischief which he brings on himself, and which he might and ought to have prevented.

Cro. Eliz. 637, 651, *Ardes v. Watkins*; Roll. Abr. 234; Moor, pl. 737; Cro. Eliz. 771, *Ewer v. Moyle*.

If A seised in fee of one acre, and possessed of a term for years in another, grants a rent out of both to B in fee, and B takes a lease or grant of the leasehold acre, the rent shall not thereby be suspended.

7 Co. 23, *Bott's case*; Co. Lit. 147, S. P.

If lessee for life or years surrenders part, or if he commits a forfeiture of part, by making a feoffment or doing waste, the rent shall be apportioned; because the rent is a retribution for the land, and therefore must necessarily cease, according to the proportion of the land resumed.

Co. Lit. 148 a; Roll. Abr. 235; Dyer, 5 a; 13 Co. 58; Moor, pl. 255.

Where the lessor takes a lease of part of the land, or enters *wrongfully* into part, there are variety of opinions, whether the entire rent shall not be suspended during the continuance of such lease or tortious entry; and in the *last* case it seems to be the better opinion and the settled law at this day, that the tenant is discharged from the payment of the whole rent till he be restored to the whole possession, that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the feudal law he ought to protect and defend.

Co. Lit. 148 b; Bro. tit. *Extinguishment*, 48; Roll. Abr. 938; 4 Co. 52; 9 Co. 135; Pollex. 142, 144; Vent. 277. || If the lessor act ministerially, as sheriff, in the eviction of the tenant, such eviction will not suspend the rent. *Vochell v. Doncastell*, Moore, 891. And a mere *trespass* by the lessor will be no suspension of the rent. *Hunt v. Cope*, Cowp. 242. In debt for rent, it is optional either to plead the entry and expulsion by the plaintiff, or to give it in evidence on *nil debet*. But in covenant for non-payment of rent, it must be pleaded. See note 2, 1 Saund. 204, and cases there cited.||

|| And where the books speak of an apportionment in case where the lessor enters upon the lessee in part, they are to be understood where the lessor enters *lawfully*, as upon a surrender, forfeiture, or the like. Thus, if a man be seised of two acres, one in fee and another in tail, and makes a lease for life or for years of both acres, and dieth, and the issue in tail avoideth the lease, the rent shall be apportioned.

Co. Lit. 148 b.

And so it has been decided where a man leases land of which he is seised in fee, and other land of which he is tenant for life with a power of leasing, and the lease is not according to the power; the lease on the death of lessor is not void but good for the lands in fee-simple, for the rent shall be apportioned.

Doe v. Meyler, 2 Maul. & S. 276, which overrules *Rees v. Philip*, 1 Wightw. 69; and see Sugden on Powers, 630, (4th ed.)

And so where, in covenant against the assignee of the lessee for non-payment of one entire rent, the defendant pleaded in bar eviction of a moiety of the premises by title paramount; and upon demurrer it was adjudged ill, because the rent might be apportioned, and the defendant had leave to amend and plead it to one moiety only.

Stevenson v. Lambard, 2 East, 575; and see Gilb. on Rents, 147.||

There is no colour of reason why the whole rent should be suspended, when the lord or lessor takes a lease of part of the land, because here is the concurrence of the tenant, who, by his own act and consent, parts with

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so much of the land as is re-demised, and thereby supersedes the former contract as to that part; but since the obligation to pay the rent was by the first contract founded upon the consideration of the tenant's enjoying the land, that obligation must still continue on the tenant so far as it is not cancelled or revoked by any subsequent contract between the parties, and consequently, the whole rent shall not be extinguished by such re-demise; but the tenant shall pay rent in proportion to the land he enjoys, because the obligation of the first contract must subsist so far as the tenant enjoys the consideration which first engaged him in such contract.

Pollex. 141—145; Vent. 276; 2 Lev. 143; Hodgeskins and Thornborough, 3 Keb. 500, 505; Roll. Abr. 938; 7 E. 3, 56, 57, and the following cases and books denied to be law. Co. Lit. 148 b; 4 Co. 52 b; 9 Co. 134; Bro. tit. *Extinguishment*, 48; and *per* Hale, C. J., if the tenant upon such re-demise reserved a rent, no part of the rent reserved upon the first contract shall be suspended. Vent. 276. ¶If the lessor takes back the *whole* premises as tenant to the lessee for the term, it operates as a surrender; and a sum reserved in such case from the lessor to lessee is not rent but a sum in gross. Smith v. Mapleback, 1 Term R. 441.¶

§ A release of part of the land out of which a ground rent issues, does not extinguish the whole rent; it discharges the part released, and leaves the other part liable for its just proportion.

Ingersoll v. Sergeant, 1 Whart. 337.

A lease was made of a mill, together with a tract of land adjoining, and a black man as a miller, for a term of years, rendering an annual rent. Previous to the lease the lessor had emancipated the miller, who was a slave, by a deed entered of record, and before the expiration of the first year the miller left the service of the lessee. Held, that the lessee was entitled to an apportionment of the rent.

Newton v. Wilson, 3 Hen. & Munf. 470.

Rents and profits of lands, the possession of which was unlawfully withheld by the ancestor in his lifetime, and by his heirs after his death, ought not to be charged against the executors and heirs jointly, but apportioned among them, according to their respective liabilities.

Roberts v. Stauton, 2 Munf. 129.¶

2. In what Cases they may be apportioned by the Act of Law, or by the Act of God.

In this place we are to consider, whether the tenant shall pay the whole rent, though part of the thing demised be lost and of no profit to him, or though the use of the whole be for some time intercepted or taken away without his default. And here it seems extremely reasonable, that if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned, because the title to the rent is founded upon this presumption, that the tenant enjoys the thing during the contract; and therefore if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it because the tenant without his default wants the enjoyment of part of the thing which was the consideration of his paying the rent; nor has the lessor reason to complain, because if the land had been in his own hands, he must have lost the benefit of so much as the sea had covered.

Roll. Abr. 236.

If part of the land be burnt with wild-fire, that shall make no abatement or apportionment of the rent, because the use of the land is not thereby

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taken away, and the land may be again restored to its former fertility by the care and industry of the tenant.

Roll. Abr. 236. If a lease be made of land with a flock of sheep, and all the sheep die, *quare*, Whether the rent shall be apportioned? Dyer, 55.—Where a house was burnt down, tenant liable for the rent. *Monk v. Cooper*, 2 Ld. Raym. 1477. [But this was on the express covenant. 2 Str. 763, S. C.; *Earl of Chesterfield v. Duke of Bolton*, Com. Rep. 627; *Belfour v. Weston*, 1 Term R. 310; *Doe v. Sandham*, Ibid. 705. ||Or if there be no agreement under seal, he may in such case recover for use and occupation. *Baker v. Holtzapfell*, 4 Taunt. 45, *acc.*; *sed vide Edwards v. Etherington*, Ry. & Moo. Ca. 268.} {The tenant is, however, liable, where there is an express covenant, though the action brought is *debt*. 3 Johns. Rep. 44; *Hallet v. Wylie*; and though the landlord covenanted to repair and has not done it. See the case above cited, and 3 Anstr. 687.} *Qu.* Whether, if an action were brought for the rent in such case, equity would not relieve? *Brown v. Quilter*, Ambl. 619. ||Equity will not relieve, or stay the action by injunction. *Holtzapfell v. Baker*, 18 Ves. 115; *Hare v. Grove*, 3 Anst. 687. || Where a landlord is bound to repair in certain cases, and the tenant in one of those cases from a sudden accident is obliged to make those repairs to prevent further mischief, if an action be brought against the tenant for the rent, a court of equity will not interpose, because the tenant may set-off in the action the money advanced by him for the repairs, as money paid to the use of the landlord. *Waters v. Weigall*, Anstr. 575.]

If A, seised of one acre in fee, and possessed of another for years, makes a lease of both, reserving rent, and dies, the rent shall be apportioned with the reversion, and the heir and executor shall have each his proportion.

Roll. Abr. 237. ||See 2 Maul. & S. 276. ||

So, if a moiety of a reversion be extended by *elegit*, the rent shall be apportioned, and the lessor shall still enjoy half the rent as incident to the reversion that remains in him.

Roll. Abr. 237, *Cambell's case*.

So, if a husband leases for years reserving rent, and dies, the wife recovers a third part of the reversion, she shall have the same proportion of the rent; for in all these cases the law distributes the rent as it disposes of the reversion.

Roll. Abr. 237.

If part of the lands descend on the grantee of a rent-charge, the rent shall be apportioned according to the value of the land; for the grantee in this case is perfectly passive, and concurs not by any act of his to defeat the grant.

Lit. § 224; Roll. Abr. 236, S. P.

§ Rent will not be apportioned in the case of an execution and sale of the land from which the rent issues. A purchaser at sheriff's sale is therefore entitled to the whole of the rent which falls due at the expiration of the quarter or other period next after the acknowledgment of the deed.

Bank of Pennsylvania v. Wise, 3 Watts, 394.

A lot was granted in fee reserving to the grantor a yearly rent, afterwards a street was opened by the authority of law through a part of the lot, and damages were awarded to the owner of the lot, a part of which the court directed to be paid to the owner of the ground rent: Held, that this was an apportionment of the rent.

Cuthbert v. Kuhn, 3 Whart. 357. See *Condit v. Neighbour*, 1 Green, 83. A rent charge may be apportioned when the owner releases a part of it to the tenant, and conveys the remainder to a stranger. *Farley v. Craig*, 6 Halst. 262.

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Mere lapse of time, without demand of payment, is not sufficient to raise a presumption that a valid ground rent has been extinguished.

St. Mary's Church v. Miles, 1 Whart. 229.*g*

3. *The Manner of such Apportionment, and how the Tenant shall take Advantage of it.*

This is properly the business of a jury, who upon the evidence offered are to judge of the value of the land purchased by the lord or lessor, or aliened by the tenant according to the statute *quia emptores*, &c., from whence it is easy for them to compute how much is due from the tenant for the residue of the land in his hands.

Vent. 276 ; Roll. Abr. 237.

This may be done upon a plea of *nil debet* pleaded by the tenant, because, when issue is joined on such plea, it is the business of the jury to determine whether any thing and how much is due ; and this is done with regard to the real value of the land remaining in his hands, and not with regard to the quantity of it.

Vent. 276.

||In covenant, the eviction or other ground of apportionment must be specially pleaded.

1 Saund. 204, note (2).||

So, the tenant may in his pleading set forth the value of the land purchased by the lessor, and that the rent ought to be apportioned or abated in proportion to the value thereof.

Vent. 276.

But the rent cannot be apportioned upon a demurrer, because the judges only determine what is the law in such case, but the value of the land never comes in question.

Hodgeskins v. Thornborough.

||And where the apportionment is made between the landlord and the purchaser of a part of the reversion without the privity of the tenant, he is not bound by it, but may dispute its propriety, and cause the rent to be apportioned anew by a jury.

Bliss v. Collins, 5 Barn. & A. 876 ; and vide 1 Ja. & W. 187.||

If there be lord and tenant by fealty, and 20s. rent, the lord purchase two acres, and then distrain for 18s. rent, supposing the rent to be apportioned according to the quantity of the land, the tenant rescue, and the lord bring his assize, and the tenant plead *nul tort*, the recognitors of the assize shall extend the land according to the real value ; for the jury, upon view of the land, are capable of judging of the value of each acre : and therefore, if they find the two acres aliened of greater value than the rest, they may apportion the rent accordingly, and give the lord but 16s. for the remaining eighteen acres. And though the lord demand more than his due, yet he shall recover what in justice he ought to have, because it were unreasonable to expect the lord should exactly judge of the value of the land, and consequently too severe to put him to the expense of a fresh suit for such mistake.

2 Inst. 503 ; Roll. Abr. 237.

But in this case, if the lord demand less than his due, he shall not recover more than he demanded, because the court must give judgment correspondent to the right of the demandant.

2 Inst. 504

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But, if in debt or covenant the landlord declares for more rent than is due to him, he may release the overplus, and take judgment for that which is really owing.

5 Mod. 214; Comb. 365; but vide Ld. Raym. 255; [Com. Rep. 42; 2 Salk. 580; 5 Mod. 363, where it was holden, that *before* judgment an avowant may abate his avowry for part of the rent distrained for, but not *after* judgment.]

||Vide as to apportionment under 11 G. 2, c. 19, § 15, and between tenant for life, and remainder-man, and between executors of parson and his successor, *ante*, p. 478, 479.||

§ 4. Of Suspension and Extinguishment.

By the entry of the lessor into part of the premises, the whole rent is suspended; he cannot apportion it by a wrongful act.

Vaughan v. Blanchard, 1 Yeates, 176; S. C. 4 Dall. 124; Bennett v. Bettie, 4 Rawle, 339; Kessler v. McConachy, 1 Rawle, 435; Lewis v. Payn, 4 Wend. 423.

But the lessor may recover rent accrued before his entry.

1 Rawle, 435.

When the right to land and the right of rent issuing out of it are united in the same person, the rent is extinguished.

Phillips v. Bonsall, 2 Binn. 142; S. C. 3 Yeates, 128.

The acceptance of a bond for rent is not an extinguishment of it.

Cornell v. Lamb, 20 Johns. 407; 1 Dall. 305.

Nor is the recovery of a judgment in covenant against the tenant, a bar to a subsequent distress.

Snyder v. Kunkleman, 3 Penns. 487.

A deed reserved a ground-rent in fee, and a time was fixed during which the grantee of the ground, by paying a certain sum, might redeem the rent. Held, that after the time had expired, the grantee had no equitable right to extinguish the ground-rent.

Matter of Shoemaker, 1 Rawle, 19. As to what creates an extinguishment of a rent, see vol. iv., tit. *Extinguishment*.

Where there is an express covenant for the payment of rent, the destruction of the premises by fire will not excuse the lessee.

Hallett v. Wylie, 3 Johns. 44.

The lessee covenanted to deliver up the premises to the lessor in good repair. To an action on this covenant for the rent and repairs, he pleaded that an alien enemy, the British army, had invaded the city of Philadelphia, where the premises were situated, and had taken possession of the premises, and held the same to the end of the term, and had committed the waste complained of. Held, that the defendant was bound to pay the rent for the whole term.

Pollard v. Shaffer, 1 Dall. 210. See Wagner v. White, 4 Harr. & Johns. 546; Lamott v. Sterrett, 1 Harr. & Johns. 42; Redding v. Hall, 1 Bibb, 536.

In Tennessee, the entry of the landlord upon the demised premises does not discharge the tenant from the payment of rent, unless he was expelled and evicted from the possession; such an entry makes the landlord a trespasser.

Wilson v. Smith, 5 Yerg. 379.

A lessee of buildings which are consumed by fire has no relief, either

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at law or in equity, against an express covenant to pay rent, unless he has protected himself in the lease, or the landlord has covenanted to rebuild.

Gates v. Green, 4 Paige, 355; Patterson v. Akerson, 1 Edw. 96; Harrison v. Murrell, 5 Monr. 360; Leeds v. Cheetham, 1 Sem. 146.

Where premises are leased for three years at a rent of "eight hundred dollars yearly," and the lessee agrees to pay the rent semi-annually, it is not a semi-annual but an annual rent; and the payment of four hundred dollars at the expiration of six months is to be considered as a part of a yearly rent, and not a payment for any specific number of months.

Irving v. Thomas, 6 Shipl. 418.

Where the lessor puts an end to a term between two days specified in the lease for the payment of rent, he is not entitled to recover an apportionment of rent, and recover the portion accrued since the last rent-day, unless there be a provision in the lease allowing a demand *pro rata*.

Zule v. Zule, 24 Wend. 76.

A provision in a lease, that the rent shall cease if the premises become untenable by fire or other casualty, does not extend to the case of a building in the city of New York, which becomes untenable in consequence of the greater portion of it being taken down, to conform to an order of the corporation for the widening of the street on which it is situate.

Mills v. Baehr's Executors, 24 Wend. 254.g

REPLEVIN AND AVOWRY.

- (A) The Nature and Description thereof.
- (B) The different Kinds of Replevins; and herein of Replevins by Writ at Common Law and by Plaint or Acts of Parliament.
- (C) Replevins, out of what Courts and by what Authority they issue: And herein of the Power and Duty of the Sheriff; ||and of Replevins for Distresses under Statutes.||
- (D) Of the Pledges in Replevin, and the Proceedings against them.
- (E) Of the Writs or Processes in Replevin: And herein,
 - 1. *Of the Original Writ of Replevin.*
 - 2. *Of the Withernam.*
 - 3. *Of the Writ of Second Deliverance.*
 - 4. *Of the Writ de proprietate probandâ, and the Claim of Property.*
 - 5. *Of the Writ de returno habendo.*
 - 6. *Of Returns irreplevisable.*
 - 7. *In what manner the Sheriff is to return and execute such Processes.*
- (F) Of what Property and for what Things a Replevin lies.
- (G) Replevin, for and against whom it lies.
- (H) Of the Declaration in Replevin.
- (I) Pleas in Replevin.

(A) Nature and Description thereof.

(K) Avowries in Replevin: And herein of what Seisin and Services, and of the Certainty required therein; [and of the Plaintiff's Plea in Bar.]

[(L) Of the Judgment in Replevin.]

As to Costs and Damages in Replevin, vide tit. "Costs," (F).

(A) The Nature and Description thereof.

REPLEVIN is a re-delivery to the owner, by the sheriff, of his cattle or goods distrained upon any cause, upon surety that he will pursue the action against him that distrained. If he pursue it not, or if it be adjudged against him, then he who took the distress shall have it again, and for that purpose may have a writ of *retorno habendo*.

Co. Lit. 145 b; 2 Inst. 139. See Hammond's Nisi Prius, 372 to 498, for a history and principles of Replevin. [Spelman in his Glossary, voc. "*Replegio*," describes it thus: *Replegiare est rem apud alium detentam, cautione legitimâ interpositâ, redimere. Et cautio hæc est stipulatio in formâ juris adhibita, de stando juri, et sistendo se foro. Dictum autem replegiare quasi revadiare, hoc est, vadum vel pignus unum loco alterius suggerere, constituere.* In other words, a replevin is a judicial writ to the sheriff, complaining of an unjust taking and detention of goods and chattels, commanding the sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or to return the goods and chattels. Gilb. Replev. 85.] In Pennsylvania, replevin is not altogether a proceeding *in rem.*, but against the defendant in the writ personally, with a summons to appear. *Bower v. Tallman*, 5 Watts & Serg. 556.

The common law action of replevin does not lie, unless there has been a tortious taking.

Wheelock v. Cozzens, 6 Howard, (Al.) R. 279; *Meary v. Head*, 1 Mason, 319; *N. C. Term Rep.* 98; 2 Murph. 357.

In Pennsylvania, replevin may be brought whenever one person claims goods in the possession of another.

Weaver v. Lawrence, 1 Dall. 157; *Woods v. Nixon*, Addis. 134; *Sherick v. Huber*, 6 Binn. 3; *Stoughton v. Rappalo*, 3 Serg. & R. 562.

Replevin lies against a sheriff's vendee to recover chattels wrongfully taken in execution and sold.

6 Binn. 2; S. C. 2 P. A. Browne, 160.

In Massachusetts replevin lies for a wrongful detention.

Badger v. Phiney, 15 Mass. 359; *Baker v. Fales*, 16 Mass. 147; *Marston v. Baldwin*, 17 Mass. 606. See *Portland Bank v. Stubbs*, 6 Mass. 422. So in Missouri, *Skinner v. Stouse*, 4 Miss. 93.

When goods are taken wrongfully and the owner is entitled to an action of trespass, replevin lies.

Bruen v. Ogden, 6 Halst. 370.

In Connecticut, replevin can be sustained only in cases of attachment or distress.

Watson v. Watson, 9 Conn. 140. See as to South Carolina, *Byrd v. O'Hamlin*, 1 Rep. Const. Ct. 401.

In Illinois, to maintain replevin there must be an unlawful taking.

Wright v. Armstrong, 1 Breese, 130. So in North Carolina. *Cummings v. M'Gill*, 2 Tayl. 98.

The action of replevin cannot be maintained unless the plaintiff have the right to immediate possession of the property.

Ingraham v. Martin, 3 Shepl. 373.

(A) Nature and Description thereof.

Replevin is a writ, and usually granted in cases of distress,^(a) and is a matter of right; so that if a man grants a rent with clause of distress, and grants further, that the distresses taken shall be irreplevisable, yet may they be replevied; for such a restraint is against the nature of a distress, and no private person can alter the common course of the law.

Co. Lit. 145. [(a) The remedy of replevin, though seldom used, except in cases of distress, seems equally applicable to other cases of wrongful taking. In the year-book 7 H. 4, 28 b, it is said, "If a man take beasts against the peace, replevin lies not. But Gascoigne said, he might elect to have replevin or trespass; but some thought otherwise, for in the replevin, if the sheriff return that defendant claims property, and on the writ *de propr. prob.* it is found that the property is in the defendant, the plaintiff shall take nothing by his writ;" but this reason does not show that replevin will not lie, but only that the action, as in other cases, will be barred by the defendant showing property in the goods. And so also in 6 H. 7, 8 b, which was an action of trespass for taking and carrying away goods in plaintiff's possession under an alleged gift from the owner to defendant, and where no question was agitated as to distress, Vavasour says, "so also of goods taken; one may divest the property out of him, if he pleases, by process of action of trespass, or he may demand the property by replevin or writ of detinue;" and vide Bro. Abr. *Replevin*; Vin. Abr. *Replevin* (B); and in 1 Scho. & Lef., Lord Redesdale, I. C., said the action was founded on *any taking* by the party, and was calculated to supply the place of detinue or trover, and prevent the party from being put to those actions, except where the other can show property in the goods. And Lord Ellenborough, C. J., expressed a similar opinion in *Doe v. Wilkinson*, 2 Stark. 287, which was an action of trover for books of account, and his lordship said replevin would have been the more convenient remedy.]

In this writ or action both the plaintiff and defendant are called actors; the one, *i. e.* the plaintiff, suing for damages, and the avowant or defendant to have a return of the goods or cattle.

2 Bendl. 84; Cro. Eliz. 799; 2 Mod. 149. {See 3 Bos. & Pul. 603, *Hodgkinson v. Snibson*.}

That the avowant is in nature of a plaintiff, appears, 1st, From his being called an actor, which is a term in the civil law, and signifies plaintiff. 2dly. From his being entitled to have judgment *de returno habendo*, and damages as plaintiff. 3dly. From this, that the plaintiff may plead in abatement of the avowry, and, consequently, such avowry must be in nature of an action.

Carth. 122; 6 Mod. 103; Yelv. 148. [But a defendant in replevin is not entitled to move for judgment, as in case of a nonsuit under the stat. 14 G. 2, c. 17. *Jones v. Concanon*, 3 Term Rep. 661; *Shortbridge v. Hiern*, 5 Term Rep. 400;] {1 Johns. Ca. 247, *Barrett v. Forrester*.} [Ante, tit. *Nonsuit*.]

* The avowant, being in nature of a plaintiff, need not aver his avowry with an *hoc paratus est verificare*, more than any other plaintiff need aver his count.

Plow. 263.

An avowant being an actor, shall not have a protection cast for him more than any other plaintiff.

2 Inst. 339.

But, though an avowry be in nature of an action, yet one tenant in common may avow for taking cattle damage-feasant.

Cro. Eliz. 530. [But see *contr.* *Lamshead v. Leate*, Sir W. Jones, 253; 1 Roll. Abr. 220, S. C., and *Calley v. Spearman*, 2 H. Bl. 386. He cannot avow alone, but must also make cognisance as bailiff of his companion.] That an avowant shall not have a *decem tales*. 2 Bendl. 26*———* It is Dalison not Bendl.; and there said, that avowant shall not have a *decem tales* if he assign not default in the plea, notwithstanding he be actor; but, if the avowant purchase the *venire facias*, there he shall have

(B) The different Kinds of Replevins.

a *decem tales*.—A *tales* may be granted at the prayer of the defendant by 14 Eliz. c. 9, why then shall not an avowant have it?

¶ Replevin is not an action within the 24 G. 2, c. 44, § 6, protecting constables, &c., acting under magistrates' warrants, from any action till demand made of the warrant.

Fletcher v. Wilkins, 6 East, 283; and see 2 Black. R. 1330, overruling Willes, R. 668.¶

Replevin is an action founded on the right, and different from (a) trespass.

Carth. 74; Yelv. 148; Hob. 16; Cro. Eliz. 799. (a) Different from a writ of execution. Carth. 380; Ld. Raym. 218. Different from detinue. Winch, 26. β Replevin is grounded on a tortious taking, and sounds in damages, like an action of trespass. Hopkins v. Hopkins, 10 Johns. 369.γ

In Finch it is held, that when in the pleadings in replevin the title of the lands is brought in question, it is then a real action; but if otherwise, that it is a personal one. But this distinction has of late been exploded, and it is now (b) held, that as no lands can be recovered in this action, it cannot, with any propriety, be considered as a real action, though the title of lands may incidentally come in question, as it may do in an action of trespass, or even of debt, which are actions merely personal. (c)

Finch's Law, 316; and vide Comb. 476; Fitzg. 109. (b) In the case of Eaton v. Southby. M. 12 G. 2, in C. B. {Willes, 131, S. C.} ¶(c) In Pearson v. Roberts, Willes, 672, Willes, C. J., said, there were two sorts of replevins: one only to have the goods again, which may be by plaint in the sheriff's court, or a mandatory writ to the sheriff; and another, by way of action, in order to recover damages only; but this last proceeding is not discoverable in the books. See 6 East, 286, where the principal point in Pearson v. Roberts was overruled.¶

β It seems replevin is a local action.

Williams v. Welch, 5 Wend. 290.γ

(B) The different Kinds of Replevins; and herein of Replevin by Writ at Common Law, and by Plaint or Act of Parliament.

REPLEVIN may be made either by original writ of replevin at common law, or by plaint by the statute of Marl. 52 H. 3, c. 21.

Co. Lit. 145, F. N. B. 69. β In Pennsylvania, there is but one kind of replevin, namely, by writ. Weaver v. Lawrence, 1 Dall. 157.γ

By this statute it is provided, "That if the beasts of any person be taken, and wrongfully withholden, the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of the liberties; and if the beasts were taken within any liberties, and the bailiff of the liberty will not deliver them, then the sheriff for default of those bailiffs shall cause them to be delivered."

The mischiefs before this act were the great delay and loss the party was at by having his beasts or goods withholden from him; as also that when cattle were distrained and impounded within any liberty that had return of writs, the sheriff was obliged to make a warrant to the bailiff of the liberty to make deliverance. There was another mischief, when the distress was taken without and impounded within the liberty; to remedy which,

2 Inst. 139; 13 Co. 31.

By this statute the sheriff, upon a plaint made unto him without writ, may either by parol or precept command his bailiff to deliver the beasts or goods, that is, to make replevin of them. By these words (*post querimo*

(C) Replevins, out of what Courts and when issuable.

niam sibi fact') the sheriff may take a plaint out of the county court and make replevin presently, which he is to enter in the court, as it would be inconvenient and against the scope of the statute that the owner, for whose benefit the statute was made, should tarry for his beasts till the next county court, which is holden from month to month. And by this act the sheriff may hold plea in the county court on replevin by plaint, though the value be of 20*l.* or above; and yet in other actions he shall only hold plea where the matter is under 40*s.* value.

2 Inst. 139; Keb. 205; Dalt. Sh. 430.

By the words of this law, *si averia capiant'*, *vicecomes post querimoniam sibi fact' deliberare posses*; so that it becomes the sheriff's duty upon such complaint, by parol or by precept to his bailiff, to replevy them, which precept may be given before any county court; but such plaint is afterwards to be entered, and as holden in *com.* by the party who made the complaint, and not by the sheriff. [*Sed quære?*]

Com. 591.

||Neither the removal of the distress from the premises, nor the appraisal, takes away the right to replevy; but the tenant may replevy at any time until the sale.

Jacob v. King, 5 Taunt. 451.||

(C) Replevins, out of what courts and by what authority they issue; and herein of the power and duty of the sheriff, ||and of replevins for distresses under statutes.||

REPLEVINS by writ issue (*a*) properly out of the courts of K. B. and C. B. at Westminster, and are returnable into such courts.

Dyer 246. (*a*) Lies by writ in the Cinque Ports. F. N. B. 67; Reg. Brev. 79.

Replevins by plaint are made by the sheriff by force of the above-mentioned statute of Marl., (52 H. 3, c. 21,) by which he is directed, upon complaint made to him by the party that his goods or cattle are distrained, to command his bailiff, (which may be by parol or precept,) to make deliverance. This plaint may be taken at any time, as well out of as in court.

Bro. Rep. pl. 40; Co. Lit. 145; 2 Inst. 139.

Also, it hath been agreed that the hundred court, and (*b*) other courts of lords of manors, may by prescription hold plea in replevin, and so may incidentally have power to replevy goods or cattle taken; but that, it seems, must be by process of the court after a plaint entered, but not by a parol complaint out of court.

Carth. 380. (*b*) Replevin lies by plaint in London. 2 Lil. Reg. 557.—But where on a *pluries* to the sheriffs of London, they returned the custom of the city, that replevin ought to be made in the sheriff's court there, and not by the king's writ, an attachment was granted; for they cannot oust the king's courts of their customs, though confirmed by act of parliament. Dyer, 245; F. N. B. 68.—By the usage in Northamptonshire, in the absence of the sheriffs, bailiff, &c., the frank-pledge may make deliverance by replevin. 2 Inst. 139.—Replevin does not lie in the Marshalsea court. 10 Co. 74.—Nor in the court of Canterbury. 3 Keb. 573.—Whether to the court of Halifax, *qu.*? 3 Keb. 550.

And therefore where in trespass for taking, &c., the defendant justified that the place where, &c., was a hundred, and time out of mind had a court of all actions, replevins, &c., grantable in or out of court, and that a replevin was granted to him by the steward out of court, *virtute cujus*, &c.; the question was, if good or not? And the reason of the doubt was, because the county court could not hold plea in replevin at common law, but were

(C) Replevins, out of what Courts and when issuable.

enabled by the statute of Marlebridge, which extends not to the hundred court, which is a court derived out of the county court. But *per cur.* clearly, supposing they may grant them in court, yet they cannot prescribe to grant them *out of court*.

2 Salk. 580. [The different reports of the case of *Hallet v. Birt* do not agree as to the opinion of the court upon this point. Carthew's report is stated in the passage immediately preceding. The language of the court in 12 Mod. 120, is this:—Suppose the hundred court might hold plea of replevin, which is hard to imagine, yet it must be as a court; and asked how a thing can be grafted on a prescription which had its original by act of parliament: and gave judgment for the plaintiff. Skin. 674, S. C. adjudged for the plaintiff; because the defendant having shown the property in a stranger, the plea amounts to the general issue; and though a hundred court may hold plea in replevin, this ought to be in court and not out of court. S. C. 5 Mod. 252, accordingly; and *per cur.*—It is true, all these courts do hold plea in replevins, but it is illegal; for the party ought to go to the sheriff for the purpose, whose court is in nature of a court-baron. Therefore this custom was holden to be void, as against law and reason. And so the plaintiff had judgment, the plea being naught. 1 Lord Raym. 219, S. C., saith, that after several arguments at the bar it was resolved, that since the sheriff could not replevy by plaint at the common law, but by writ only, and that in his county court, the hundred court, which derives its authority from the county court, cannot do it by prescription. And the statute of Marlebridge does not extend to the hundred court; therefore this replevin granted out of this court is ill, especially being granted by the steward, who is not a judge of the court; and the usage in such case will not alter the law; therefore judgment was given for the plaintiff.]

||However, where the assignee of a replevin bond, taken by the mayor of a city, did not show in his declaration any custom for the mayor to grant replevins or to take bond, and did not show that the plaint was made *in court*; it was held, that these were no objections to the declaration even on special demurrer, since the mayor might by legal possibility have had full power to do all he did; and the case of *Hallet v. Byrt* was held to apply only to replevins in hundred courts.

Wilson v. Hobday, 4 Maul. & S. 120.||

The sheriff is obliged to grant replevins in all cases where they are allowed by law, and the officer, who takes the goods by virtue of a replevin issuing for what cause soever, is not liable to an action of trespass, unless the party in whose possession the goods were claims property in them. And note, that in all cases of misbehaviour by the sheriff or other officers, in relation to replevins, they are subject to the control of the king's superior courts, and punishable by attachment for such misbehaviour.

Carth. 381.

||But the courts will not grant an attachment against the sheriff or officer for not taking a replevin bond, or for taking one with insufficient sureties, but will leave the party to his remedy by action or *scire facias*; for as the taking the bond is directed by act of parliament, (11 Geo. 2, c. 19, § 23,) and not by the court, the neglect to do so is not a contempt.

Twells v. Colville, Willes, R. 375; Rex v. Lewis, 2 Term R. 617; Tesseyman v. Gildart, 1 New R. 292, which seems to overrule Richards v. Acton, Black. R. 1220.

And the court will not on motion order the sheriff to enter a plaint in replevin in the county court. *Qu.* Whether a *mandamus* would be granted?

Ex parte Boyle, 2 Dow. & Ry. 13.||

And though the sheriff may grant replevins by plaint, and may proceed thereon in the county court, yet if any thing touching the freehold come in question, or ancient demesne be pleaded, the sheriff can proceed no further;

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nor can any such proceedings be carried on in the hundred court, court-baron, or any other court claiming a jurisdiction herein by prescription.

4 H. 6, 30; 2 H. 7, 6; Co. Lit. 145.

So, when the king is party, or the taking is in right of the crown, in these cases the sheriff is to surcease.

Bro. tit. *Repl.* pl. 33; Brown. 33. [Vide Bro. tit. *Repl.* pl. 51, *contr.* And a replevin lies against the king, if goods be in his hands. *Per* Hide, to the Lords, 3 Rush. 1361. But, if a distress is taken upon a fee-farm rent or other duty to the crown, it is considered as a contempt to replevy; and an attachment will issue upon it. *Rex v. Oliver*, Bunb. 14. And if a man at this day, there being a seizure in order to condemnation, were to presume to replevy the goods, it would be a contempt of the Court of Exchequer, for which an attachment would be granted instantly. *Per* Eyre, C. B. Anstr. 212.]

It was ruled in the case of one Bradshaw, that when an act of parliament orders a distress and sale of goods, this is in nature of an execution, and replevin does not lie: but, if the sheriff grants one, yet it is not such a contempt as to grant an attachment against him. (a) And Powell, J., said, he remembered a case in the Exchequer, where a distress was taken for a fee-farm rent due to the king, yet upon debate in the court no attachment was granted, (b) though it was in the king's case.

T. 12 W. 3, in C. B., Bradshaw's case. Vide 14 Car. 2, c. 12. (a) *Sed vide post.* [(b) But now in such cases it is considered as a contempt for a party to replevy; and an attachment will issue upon it. *Rex v. Oliver*, Bunb. 14; Anstr. 212, S. C. cited by Eyre, C. B.]

[If a *superior* jurisdiction award an execution, it seems that no replevin lies for the goods taken by the sheriff by virtue of the execution; and if any person should pretend to take out a replevin, and execute it, the court would commit him for a contempt of their jurisdiction, because by every execution the goods are in the custody of the law, and the law ought to guard them: and it would be troubling the execution awarded if the party on whom the money was to be levied should fetch back the goods on a replevin. And therefore the courts construe such endeavours to be a contempt of their jurisdiction, and upon that account commit the offender. But if any *inferior* jurisdiction issues an execution, a replevin will lie for the goods taken by that execution; because the inferior jurisdiction being restrained within particular limits, the officer who took the goods is obliged to show that he took the goods within those limits, and that the inferior court which issued the execution, did not exceed their authority in issuing it; ||besides, an inferior court of record cannot commit for contempt *out of court.* (c)]

Gilb. Replev. 161. ||(c) But, with great deference to so high an authority as Lord C. B. Gilbert, the two reasons given for the latter position by no means warrant it. His first reason fails if the officer took the goods within the limits of the particular jurisdiction, and if the inferior court did not exceed their authority in issuing the execution—in short, if it be a legal execution regularly executed. And with regard to the second reason, it does not follow, because an inferior court cannot commit for a contempt out of court, that therefore a replevin will lie. The want of authority to inflict one particular (and that an extraordinary) punishment for doing the thing, does not prove that the thing itself may be legally done. The only authority cited by Gilbert in support of this opinion is the case of *Aylesbury v. Harvey*, 3 Lev. 204; of which it is sufficient to observe, 1st, that this question was neither agitated at the bar, nor decided by the bench; and, 2dly, that the judgment of the court was against the plaintiff in replevin. But in opposition to this opinion may be placed Bradshaw's case, T. 12 W. 3, *ante*; *R. v. The Sheriff of Leicestershire*, 1 Barnard. B. R. 110. *R. v. Monkhouse*, 2 Stra. 1184. and *R. v. Burchett*, *Ibid.*, note (1), in which it was

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decided, that where an act of parliament orders a distress and sale of goods, it is in the nature of an execution, and a replevin does not lie; and in two of which cases an attachment was granted, in the one against the sheriff, and in the other against the party replevying; and in *R. v. Burchett*, from a MS. note, it is said, "The ground of the decision was, that the conviction was conclusive, and its legality could not be questioned in a replevin." In *Milward v. Caffin*, 2 Black. Rep. 1330, (*post* in text,) the special jurisdiction which was given to the justices of the peace by the statute 43 Eliz. c. 2, and 17 Geo. 2, c. 38, *was exceeded*, and the goods were not in contemplation of law taken under an execution; and in *Pritchard v. Stevens*, 6 Term R. 522, (*post* in text,) the court merely refused to quash the proceedings on a summary application, leaving it to defendant to put his objection in a formal manner on the record; and see more recent cases stated in the text, which confirm Bradshaw's case, and the cases in *Barnardiston* and *Strange* cited above.]]

||However, replevin does not lie for goods distrained on a conviction for deer-stealing, or for an offence against the game laws; and if the sheriff or officer grant it, an attachment will go against him.

Rex v. Monkhouse, 2 Stra. 1184; *Rex v. Burchett*, *Ibid.*, note (1); 8 Mod. 208.]]

[But when justices *exceed* the special jurisdiction given to them by a particular statute, the goods which have been distrained in consequence of such excess of jurisdiction may be replevied, even though the court of appeal has confined the warrant of distress. As, where a distress was taken for a poor's rate for lands not in the occupation of the plaintiff, the court held, notwithstanding the sessions on appeal had confirmed the rate, that the distress was replevisable, because the determining that a man may be assessed for what he does not occupy, was an excess of the jurisdiction given by the 43 Eliz. c. 2, and 17 G. 2, c. 38.

Milward v. Caffin, 2 Bl. Rep. 1330.] {See 5 Bos. & Pul. 399, *Fenton v. Boyle*.}

||But where a magistrate acts *within his jurisdiction* in ordering a distress, his decision cannot be questioned in an action of replevin. Therefore replevin does not lie for a distress made under a magistrate's warrant on the statute of labourers, (20 G. 2, c. 19,) for a sum adjudged by the magistrate to be due for wages from the plaintiff to a labouring servant; for the magistrate is acting within his jurisdiction.

Wilson v. Weller, 1 Bro. & B. 57.

So, also, where a statute declares that the decision of commissioners thereby appointed shall be final, that decision cannot be questioned in an action of trespass for distraining, and the same objection would apply to an action of replevin.

Earl of Radnor v. Reeve, 2 Bos. & P. 391; and *vide Willes*, R. 668; 1 H. Bl. 68.]]

[It hath been said, that goods taken under a warrant of distress granted by commissioners of sewers, cannot be replevied by the sheriff, at least, whilst in the hands of the officer. But this opinion hath been doubted of by very high authority. And where goods so taken had been actually replevied, and the proceedings in replevin had been removed into the King's Bench, that court refused to quash the proceedings in a summary way, but left it to the defendant in replevin to put his objection on the record.

Callis, 195, 7, 200; *Pritchard v. Stevens*, 6 Term R. 522.]

||So also where replevin was brought for goods levied under a warrant of distress for an assessment made by a special sessions, under the highway act, 13 Geo. 3, c. 78, on the ground of the premises for which the plaintiff was assessed being situate without the township liable to repair the road, the court refused to set aside the proceedings. But these cases are

(D) Pledges in Replevin, and suing them.

not authorities that replevin was maintainable, but only that the court will not summarily interfere.

Fenton v. Boyle, 2 New R. 399.¶

And for the greater ease in bringing replevins, and as a duty incumbent on the sheriff, it is enacted, by the 1 & 2 Ph. & Mar. c. 18, "That the sheriff shall, at his first county day, or within two months after he receives the patent, depute and proclaim in the shire-town four deputies to make replevins, not dwelling above twelve miles distant from one another, on pain to forfeit for every month he wants such deputy or deputies 5*l.*, to be divided between the king and the prosecutor."

¶If a replevin is granted by a deputy not appointed according to this act, it is a ground for a prohibition to the sheriff to restrain him from proceeding in the replevin suit. No fees are given by the statute to the deputy or replevin clerk, but he may sue for a reasonable remuneration.

Griffiths v. Stephens, 1 Chitt. R. 196; Brandon v. Hubbard, 4 Moo. 367; S. C. 2 Bro. & B. 11; for the deputation see Wilkinson on Replev. Prac. Form, 1.¶

¶An action of replevin for a vessel will not lie in a court of common law, after a decree of condemnation as prize by a court of admiralty

W. B. v. Latimer, 4 Dall. Appt. i.

A suit in a state court by replevin, cannot supercede the right of a court of admiralty to proceed in *rem*, to enforce a lien against property which is within the jurisdiction of the admiralty.

Certain Logs of Mahogany, 2 Sumner, 589.

Where a marshal of the United States, by virtue of a *feri facias*, issued out of a district court of the United States against A, B, and C, upon a judgment in favour of the United States, against them, seized upon the property of D, *held*, that replevin might be maintained in a state court by D against the marshal, though in seizing the property, the marshal acted under the authority of the district attorney of the United States; and the state courts have jurisdiction in such a case.

Bruen v. Ogden, 6 Halst. 370.¶

(D) Of the Pledges in Replevin, and the Proceedings against them.

WHEN the sheriff makes replevin, he ought to take two kinds of pledges, *plegii de proseguendo*, by the common law, and *plegii de returno habendo*, by the statute of West. 2, (13 Ed. 1, stat. 1,) cap. 2, by which it is provided, "That sheriffs or bailiffs from thenceforth shall not only receive of the plaintiff pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded; and if any take pledges otherwise, he shall answer for the price of the beasts, and the lord that distrains shall have his recovery by writ, that he shall restore to him so many beasts or cattle; and if the bailiff be not able to restore, his superior shall restore."

1 Inst. 340; Dalt. Sh. 433; Hutt. 77.

In the construction hereof, the following cases have been ruled, and opinions holden.

That if the sheriff returns insufficient pledges, he shall answer according to the statute; for insufficient pledges are no pledges in law; and such pledges must not only be sufficient in estate, viz., capable to answer in value, but likewise sufficient in law, and under no incapacity; and there-

(D) Pledges in Replevin, and suing them.

fore infants, feme covert, persons outlawed, &c., are not to be taken as pledges, nor are persons politic, or bodies corporate.

Co. Lit. 145; 2 Inst. 340; 10 Co. 102. *β* Oxley v. Cowperthwaite, 1 Dall. 349; Pearce v. Humphreys, 14 S. & R. 23; Murdoch v. Will, 1 Dall. 366.*g*

In replevin the sheriff did not return any pledges, and after issue joined and found, it was moved, if they could be put in by the court after verdict; and the court held they might, notwithstanding the said statute of Westm. 2, (13 Ed. 1, st. 1,) as before that statute the court might take pledges on the omission of the sheriff. And a diversity was taken between pledges for prosecuting, which were at common law, and *pro returno habendo* given by this statute; and the court held, that though upon the default of the sheriff he was subject to the actions of the party, that yet the taking of pledges by the court did not make the judgment erroneous.

Noy. 156; T. 4 Car. 1.

A replevin by plaint was sued in the sheriff's court in London, and pledges were found *de returno habendo si*, &c., this plaint was removed according to their custom into the Mayor's court, and after into the King's Bench by *certiorari*, and there oyer of the *certiorari* being demanded, the party declared in B. R. Upon this a return was awarded, and upon an *elongat'* returned a *scire facias* went against the pledges in the sheriff's court of London. Upon a demurrer, the question, was, whether this case being removed by a *certiorari*, the pledges in the inferior court are discharged, or whether they remain liable to be charged by this *scire facias*? The court was inclined to be of opinion, that the pledges are not discharged, for the mischief that might ensue; for then the plaintiff might bring a *certiorari*, and the defendant would lose his pledges; and on the other side, they doubted whether the *principal* be in court but at his pleasure, and that he is not demandable, and cannot be nonsuited. But afterwards at another day it was adjudged, that the pledges were not discharged.

Skin. 244, pl. 9; 2 Show. 421, pl. 388; Comb. 1, 2; 3 Mod. 56, S. C.

In case the plaintiff declared that he distrained for 7*l.* 10*s.* rent, reserved on a lease, and that the defendant delivered the cattle without taking pledges; to which the defendant pleaded, that the plaintiff in the replevin delivered to him 3*l.* 10*s.* for pledges, which he accepted; and on demurrer, the court held, that pledges being to be found to answer the party, if he had good cause of avowry, and to be answerable for the amercement to the king, if he be nonsuited, or if it be found against him; the taking of money for a pledge was not lawful; and that although he might take money for pledges, yet he ought not to accept less than the plaintiff's demands; on which account the court likewise held the plea vicious. But they agreed, that if the mayor had taken but one pledge, (if he had been sufficient), it had been well enough.*

Cro. Car. 446; Jon. 378, S. C. Moyser v. Gray, Mayor of Beverly. *On a *scire facias* against a sheriff for not taking pledges, he must plead *ad idem*. Hayn v. Biggs, Fort. 331.

But it hath been adjudged, that a bond taken by the sheriff, conditioned that if the party applying for the replevin should appear at the next county court, &c., and prosecute his action with effect, and should make return of the thing replevied, if return should be adjudged, and save the sheriff harmless, &c., was good in law, and agreeable to the intention of the statute

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of Marleb. (52 H. 3, c. 21), which requires pledges or sureties, of which nature the obligors are. And this method of taking bond instead of pledges was said to be of ancient usage; and that in the old books *plegii* signified the same as sureties; and that, there being a proper remedy on such bond, it differed from the above case in Cro. Car. of taking a deposit or sum of money. But the court agreed, that at common law this bond had been void, because it had been to save the sheriff harmless in making replevin by plaint, which it could not have done before the statute of Marleb.

Ld. Raym. 278; 2 Lutw. 686, *Blakitt v. Crissop*.

If in replevin in an inferior court, the condition of the bond is, *if he prosecute his suit commenced with effect in the court of—, and do make return, &c., if a return be adjudged by law*, and it happens, that the plaintiff hath judgment in the court below, which is afterwards reversed on a writ of error in B. R. in such case, unless the party makes a return, he forfeits his bond; for though he had judgment in the court below, yet the words, *if he prosecute his suit commenced, &c.*, extend to the prosecution of the writ of error, which is part of the suit commenced in the court below. And in this case, the taking of such bond was held to be (a) lawful, and said to be the common practice.

Carth. 248; Show. 400, *S. C. Chapman v. Butcher*. (a) Fitz. 158; Fortesc. R. 209, 210.

In debt upon a replevin-bond taken by the sheriff, conditioned that if C B appear at the next county court, and prosecute with effect for taking, &c., and make return, &c., if return be adjudged, and save harmless the sheriff, &c., then, &c., the defendant after oyer pleaded, that at the next county court, *tent. tali die*, he did appear, and prosecuted, &c., until it was removed by *recordari*, and did save harmless the sheriff, but did not say that no *return' habend'* was adjudged. Upon demurrer, the court inclined for the plaintiff; for the defendant should have said, that no return was adjudged at all; and though he prosecuted to the *recordari*, yet *return' habend'* might be adjudged afterwards; and the condition goes to any adjudication of return. (b)

Comb. 228, *Lane v. Foulk*. (b) In debt on a replevin-bond, it is a bad plea, that defendant appeared at the county court; he must follow it, wherever removed, to the end of the cause. Anon., Fort. 209; *Nichols v. Newman*, Fort. 361.—In debt on a replevin-bond, that he had performed all conditions is a bad plea; he should plead he did indemnify. *Lutwydye v. Jameson*, Fort. 210.—If debt is brought on a replevin-bond for not prosecuting in the county court with effect, and plaintiff replies, he (present defendant) removed it by *recordari* into C. B. and was there nonsuited, the replication is well. *Vaughan v. Norris*, Ca. temp. Hardw. 137.

An action was brought upon a bond in replevin to prosecute his suit with effect, and also to make return, &c., the defendant pleaded, that E G did levy a plaint in replevin in the court before the steward of Westminster, and that afterwards, and before the suit was determined, viz., on such a day, &c., E G died, *per quod* the suit abated; the plaintiff replied, *quod bene et verum est*, that E G levied such a plaint against the defendant, who immediately afterwards exhibited an English bill in the exchequer against the plaintiff in that suit, and by injunction hindered the proceedings below until such a day, &c., on which the said E G died; so that he did not prosecute his suit with effect. Upon a demurrer to this replication the defendant had judgment; for *per Holt, Ch. J.*, this was a prosecution with effect, because there was neither a nonsuit nor verdict against E G.

Carth. 519, *Duke of Ormond v. Bierly*.

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{To an action of debt on a replevin-bond, the condition of which was, that if the plaintiff in replevin should prosecute his writ to final judgment, pay such damages and costs as shall be adjudged against him, and return the cattle, then, &c., the defendant pleads that there has been no final judgment, that he should return the cattle, or that he should pay damages or costs. And the plea was adjudged bad, as one part of the condition was that the plaintiff in replevin should prosecute his suit to final judgment, and in the bar he did not allege that he prosecuted his replevin, nor plead any excuse or justification for not doing it.

2 Mass. T. Rep. 518, Lindsay v. Blood.

If goods taken in execution or attached are in fact replevied and taken from the custody of the officer, whether by right or wrong, the plaintiff in replevin and his sureties are answerable on the replevin-bond, and cannot be admitted to say in their defence that the writ was issued and executed contrary to law.

3 Mass. T. Rep. 303, Fragg v. Tyler.

In an action on the replevin-bond, after the writ *de retorno habendo* has been returned *elongatur*, the defendant cannot give evidence that the goods had been tendered to the plaintiff, and therefore that the condition of the bond had been performed; for the sheriff's return cannot be contradicted.

1 Dall. 439, Phillips v. Hyde.

The jury in such an action may and ought to include in their verdict the costs which accrued on the replevin.

1 Dall. 439, Phillips v. Hyde.}

In an action upon a replevin-bond, common bail shall be filed.

Salk. 99, pl. 8.

There are two sorts of pledges, *plegii de prosequendo* and *plegii de retorno habendo*; the pledges of prosecuting were at common law, but those *de retorno habendo* were appointed by West. 2, (13 Ed. 1, st. 1,) c. 2, by which statute an action lies against the sheriff if he omits to take pledges, or if he takes those that are insufficient; for, the party may have a *scire facias* against the pledges, where the suit is in any court of record. And though, in the county court, &c., a *scire facias* will not lie against the pledges, because these are not courts of record, and every *scire facias* ought to be grounded on a record, yet, there the party may have a precept in nature of a *scire facias* against the pledges.

Ld. Raym. 278; *per* Holt, Ch. J.; and vide Comb. 1, 2; Com. 593. [And not only the sheriff but the under-sheriff, and the replevin-clerk, are responsible for the sufficiency of the sureties. Richards v. Acton, 2 Bl. Rep. 1120.] {See 4 Bos. & Pul. 292, Tesseyman v. Gildart.}

An action on the case was brought against a sheriff for taking insufficient pledges upon a replevin; to which he pleaded not guilty, and a verdict being found against him, and judgment given thereon in the court of C. B., on a writ of error in B. R. it was objected, 1st, that an action on the case was not the proper remedy; 2dly, supposing such action lay, that there ought to have been a *scire facias* first sued out against the pledges. As to the first the court held, that the party distraining has by the statute of West. 2, (13 Ed. 1, st. 1,) an interest in the pledges, and if the sheriff omits to take such, or which is the same thing, takes insufficient ones, he is aggrieved, and, consequently, entitled to his action. 2dly, That though

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a *scire facias* may be brought against the pledges, yet it does not follow from thence, that an action does not lie against the sheriff; and such *scire facias*, which is only to certify the sufficiency of the pledges, is the less necessary in the present case, such insufficiency being set forth in the declaration, and found by the verdict.

16 Vin. Abr. 399, pl. 4, M. 12 G. 2, Rouse v. Paterson, in B. R. [Bull. N. P. 60, (4th edit.) S. C. by the name of Prowse v. Pattison.] {1 Dall. 341, Murdoch v. Will. The action lies without averring that the sheriff *knew* that the pledges were insufficient. And proceeding against the pledges is not a waiver of the action against the sheriff. 2 Mass. T. Rep. 188, Sparhawk v. Bartlett. The sheriff is responsible, too, that the pledges shall *eventually prove* sufficient, and not only that they were of good credit when they entered into the bond. 1 Dall. 349, Oxley v. Cowperthwaite. See 1 Dall. 439, Phillips v. Hyde. So, in 1 Dall. 341, Murdoch v. Will; Willes, 375, n.; Willes, 375, Twells v. Colville, S. P.}

||In the action against the sheriff some evidence must be given of the insufficiency of the pledges; but slight evidence is sufficient to throw the burden on the sheriff, for the sureties are known to him, and he is to take care that they are sufficient. The sheriff, however, is not bound to warrant the sureties; if they are apparently responsible at the time when taken, that discharges him. The extent of the sheriff's liability in this action does not appear to be yet precisely settled. In one case, (a) Gould, J., held, that the plaintiff might recover the costs of the replevin suit as well as the rent in arrear. Subsequently the court of K. B. (b) held, that the sheriff was not answerable beyond the value of the distress. The court of C. B. afterwards determined that he was liable for the whole damage sustained by his neglect. (c) But the same court afterwards decided, (d) that he should be liable no further than the sureties would have been if he had done his duty, and taken a bond under the statute 11 Geo. 2, c. 19; and that, as their responsibility was limited to double the value of the goods distrained, that sum ought to be the measure of damages in the action against the sheriff. (e)

Saunders v. Darling, Bull. N. P. 60; Hindle v. Blades, 5 Taunt. 225. (a) Gibson v. Burnell, cited 2 H. Bl. 549; 4 Term R. 434. (b) Yea v. Lethbridge, 4 Term R. 433. (c) Concanen v. Lethbridge, 2 H. Bl. 36. (d) Evans v. Brander, 2 H. Bl. 547. ||(e) It is difficult to understand the principle of the case of Concanen v. Lethbridge, which gave damages against the sheriff beyond the amount of the bond. The true measure of the damage would seem to be, either that adopted by the K. B. in Yea v. Lethbridge, viz., the value of the distress, or that taken by the C. B., in Evans v. Brander, viz., double the value being the amount of the bond under the statute. In support of the former, it may be said, that the value of the goods is the whole damage sustained by the sheriff's misconduct in taking an insufficient bond, since the condition would have been performed had the actual goods been returned, and that the double value in the bond is only a penalty for securing the return; but, on the other hand, it may be said that the provision of the statute insures to the defendant in replevin, either that the goods shall be returned, or, in case they are not, double their value; and therefore that the goods being eloigned, the defendant ought to recover against the sheriff, in case of an insufficient bond, the same sum which he might have recovered against the sureties had the sheriff done his duty. Perhaps, therefore, the measure of damages in Evans v. Brander is the more just, though a high authority is reported to have held according to Yea v. Lethbridge, 3 Stark. Ca. 171. ||

In an action for taking insufficient sureties, the sheriff is not liable to the expenses of a fruitless action brought against the pledges, unless he has had notice of the intention to sue them.

Baker v. Garratt, 3 Bing. 56.

It has before been seen, that the party being entitled to an action against

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the sheriff for omitting to take a bond, the court will not grant an attachment against him.

Rex v. Lewis, 2 Term R. 617; and vide Willes, R. 375; 1 New R. 292.

Where there is no avowant on the record, the action against the sheriff ought to be brought by the person making cognisance.

Page v. Eamer, 1 Bos. & Pul. 378.

In the action against the sheriff, the sureties in the replevin-bond may be witnesses to prove whether they were sufficient or not: and if the avowant, or person making cognisance, take an assignment of the replevin bond, and sue the principal and sureties, and they are found insufficient, he may afterwards bring an action on the case against the sheriff for taking insufficient sureties; for taking the assignment from the sheriff is no waiver of proceedings against him, as in the case of a bail-bond.

5 Taunt. 225; 1 Will. Saund. 195 f.¶

And for the greater security of persons distraining for rent, it is enacted, "That sheriffs, and other officers having authority to grant replevins, shall in every replevin of a distress for rent take in their own names, from the plaintiff and two sureties,(a) a bond in double the value of the goods distrained, (such value to be ascertained by the oath of one or more witnesses not interested, which oath the person granting such replevin is to administer,) and conditioned for prosecuting the suit with effect and without delay, and for returning the goods, in case a return shall be awarded, before any deliverance be made of the distress; and such sheriff or officer taking such bond shall, at the request and costs of the avowant or person making consurance, assign such bond to the avowant, &c., by endorsing the same, and attesting it under his hand and seal in the presence of two witnesses, which may be done without any stamp, provided the assignment be stamped (b) before any action be brought thereon; and if the bond be forfeited, the avowant, &c., may bring an action thereupon in his own name, and the court may by rule give such relief to the parties upon such bond as may be agreeable to justice; and such rule shall have the effect of a defeasance."

11 G. 2, c. 19, § 23. {Where there are both an avowry and cognisance in the action of replevin, the bond may be assigned to the avowants alone, without the cognisor, they being the parties really interested. 1 Bos. & Pul. 381, n., Archer v. Dudley. Vide Willes, 460, Barker v. Horton.} ¶(a) The statute does not avoid the sheriff's power of taking a security for return of the goods as before the statute; and therefore it is no plea to an action on the replevin-bond, that it is not signed by the plaintiff and two sureties, Austen v. Howard, 7 Taunt. 28; and the court will not attach the sheriff for not taking a bond, for it is no contempt, Willes, 375; 1 New R. 292; nor stay the replevin suit on that account. Ibid. (b) This stamp duty has ceased since 10th October, 1824, 5 G. 4, c. 41.¶

¶Under this statute, the defendant in replevin is entitled to an assignment of the bond if the plaintiff do not appear in the county court and prosecute according to the condition; and he may sue the bond as assignee of the sheriff in the superior court, though the replevin be not removed out of the county court.

Dias v. Freeman, 5 Term R. 195.

The condition is not satisfied by a prosecution of the suit in the county court. out the plaint, if removed by *re. fa. lo.* into the superior court, must be prosecuted *there* with effect, and a return made, if adjudged, *there*.

Gwillim v. Holbrook, 1 Bos. & Pul. 410.

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The defendant is not entitled to an assignment of the replevin-bond on the plaintiff's neglect to declare at the next county court, if he himself have not then appeared to the summons.

Seal v. Phillips, 3 Price, R. 17.

In an action on the bond alleging a breach in not prosecuting the replevin suit according to the tenor and effect of the condition, it is a good plea that defendant did appear at the next county court, and there prosecute the suit, which was still undetermined and depending; and it is not sufficient for the plaintiff to reply that the defendant did not prosecute the suit as in the plea mentioned, but wholly abandoned the same, and that the said suit is not still depending. The plaintiff must show a legal determination of it.

Brackenbury v. Pell, 12 East, 585.

Allowing two years to elapse without proceedings is a breach of the condition, although judgment of *non pros.* was never signed in the county court.

Axford v. Perrett, 4 Bing. 586.

In debt on a replevin-bond, assigning as a breach the non-return of the goods, the plaintiff may, after signing judgment against defendant for not returning the demurrer-book, tax the costs, and issue execution for the costs and the amount of the goods distrained, as endorsed on the replevin-bond, without executing a writ of inquiry.

Middleton v. Bryan, 3 Maul. & S. 155.

To an action against a surety in the bond, averring a judgment for the plaintiff (defendant in replevin) for a return of the goods, and assigning a breach in no return having been made, the surety cannot plead that the judgment was obtained against his principal by fraud, viz., by the plaintiff, in collusion with the principal, procuring the principal to confess, and by the principal fraudulently confessing the replevin-action; for this is no more than saying that the plaintiff and the principal fraudulently agreed together to defraud one another!—But it seems the plea might have been good, if it had averred that this agreement was for the purpose of defrauding the pledges in replevin. In this case it was held not a good plea for such surety that the plaintiff and defendant in replevin, without his knowledge, referred the matters in the suit to arbitration, and by mutual agreement suspended the proceedings in replevin during the reference. But the Court of Exchequer afterwards granted an injunction on this ground, restraining proceedings on the bond; holding that the bond became *functus officio* by the agreement of reference.

Moore v. Bowmaker, 7 Taunt. 97; 2 Marsh, 392, and 6 Taunt. 379; Bowmaker v. Moore, 3 Price, 214; and see Archer v. Hale, 4 Bing. 464, *acc.*

The condition of the bond is twofold, and not alternative, viz., for prosecuting the suit with effect, *and* for duly returning the goods if a return is awarded; and the bond is forfeited by a breach in either respect. (a) Therefore, where the plaintiff in replevin is nonsuited, and the avowant, instead of proceeding at common law for a return, proceeds by writ of inquiry, and has judgment on the stat. 17 Car. 2, c. 17, for the arrearages of rent and costs, he may still proceed against the pledges for the breach of the condition in the plaintiff's not prosecuting with effect; and not prosecuting with *success* is "not prosecuting with effect." If the action is

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enforced so as to work injustice, the surety has a plain remedy, under the last clause of the twenty-third sect. 11 Geo. 2, c. 19, by an application to the court for relief.

Turnor v. Turner, 2 Bro. & B. 107; Perreau v. Bevan, 5 Barn. & C. 284. (a) The declaration in this case only assigned a breach in not prosecuting with effect. Dan. pier, J., in Phillips v. Price, 3 Maul. & S. 183, seems to have considered the condition as alternative; saying, "You must negative both parts of the condition; if the party make a return he need not prosecute with effect, if he prosecute with effect he need not make a return." But it is now settled by Perreau v. Bevan, 5 Barn. & C. 284, that the defendant in replevin may assign a breach of the bond, and recover for not prosecuting with effect, although no writ *de retorno habendo* has issued, and without even averring in his declaration that no return has been made.

The avowant and person making cognisance may sue jointly on the bond after assignment, or it may be assigned to the avowant alone and he may sue alone.

Phillips v. Price, 3 Maul. & S. 180; Archer v. Dudley, 1 Bos. & Pul. 381, n.

The declaration is not double for alleging that the defendant did not prosecute his suit with effect, and hath not made a return, but it is not necessary to allege both.

3 Maul. & S. 180, 183; 5 Barn. & C. 284.

If the sheriff take a replevin-bond from one surety only, it is no plea to an action upon it, that the bond purporting to be entered into by two sureties was, in fact, executed by the defendant and the principal only; but *quære*, whether the surety might not avoid the bond, by pleading that he only delivered it as an escrow till the other surety executed it?

Austen v. Howard, 7 Taunt. 28, 327; S. C. 1 Moo. 68.

In an action by the sheriff against such single surety, the sheriff cannot recover the costs of defending an action against himself by the cognisor in the replevin for having taken insufficient sureties, since they are incurred by his own misconduct; and as the surety is deprived by that misconduct of the benefit of having a co-surety liable to him for contribution, the sheriff can only recover against him a moiety of the damages recovered in the action against the sheriff.(a)

(a) *Sed vide* note as to this measure of damages, 7 Taunt. 335.

The two sureties are only liable to the amount of the penalty of the bond, and the costs of the suit on the bond.

Hefford v. Alger, 1 Taunt. 218.

A rent-charge is within the meaning of this clause of the statute, and, on a replevin of a distress for such rent, the sheriff may take and assign a bond.

Short v. Hubbard, 2 Bing. 349.||

β The sureties in a property bond are liable to the full amount of the penalty of their bond.

Miller v. Foutz, 2 Yeates, 418.

When on a claim of property, a bond is given for a return of the goods, "if a return thereof should be adjudged by law," held, that although this part of the condition was bad, yet that it did not avoid the whole bond, but that the remaining clauses of the condition might be enforced.

Chaffee v. Sangston, 10 Watts, 265.g

(E) Of the Writs or Processes in Replevin: And herein,

1. Of the original Writ of Replevin.

THE original writ of replevin issues out of Chancery,^(a) and neither that nor the *alias* replevin are returnable, but are only in nature of a *justicies* to empower the sheriff to hold plea in his county court where a day is given the parties. But the *pluries* replevin is always with this clause, *vel causam nobis significes*, and it is a returnable process.

F. N. B. 69, 70; Doct. pl. 313, 314; 2 Inst. 139; Salk. 410.—That it is usual to take out the writ *alias* and *pluries* at the same time. Dalt. Sh. 273. {See 1 Dall. 156, Weaver v. Lawrence.} [(a) Replevin by original writ is now obsolete in England, though frequent in Ireland. The last instance in the English Chancery seems to be in 1743. 2 Atk. 237.]

[When the *pluries* issues, it hath been much disputed, whether the sheriff's *vicontiel* power be determined. And it is said in one case,^(b) that since the writ is to replevy, *vel causam significes*, the *vicontiel* power determines. But, if the sheriff does not replevy, then he is to show cause why he did not; and this is argued to be the sense of the writ from the disjunctive words contained in it. But I take it, saith Gilbert, that the *vicontiel* power is determined by the *pluries*. 1. Because the sheriff has been twice guilty of neglecting his duty, and therefore is not to be trusted with judicial power. 2. He is answerable to the court how he has obeyed the writ; and therefore the court must have the writ, to see whether he has done his duty or not. And if the court be entitled to the writ, to see whether the officer has done his duty, he cannot proceed on the writ.

Gilb. Replev. 106. (b) 2 H. 7; 5 Fitz. Abr. tit. *Replevin*, pl. 16.]

If a *pluries* replevin be returned in Michaelmas term, that the defendant claimed property, and after nothing be done, nor any appearance nor continuance till Easter term after, at which term they appear and plead, and judgment be thereupon given; though no continuance was between Michaelmas and Easter, yet this is not a discontinuance, because there is not any continuance till appearance, for the parties have not any express day in court, and where there is not any continuance, there cannot be any discontinuance.

Roll. Abr. 485, Gawen v. Ludlow; Moor, 403, S. C. adjudged, that the plaintiff may have a writ *de proprietate probandâ* without continuance of the replevin, though it be two or three years after, because by the claim of property the first suit is determined.

The *pluries* replevin supersedes the proceedings of the sheriff, and the proceedings are upon that, and not upon the plaint, as they are when that is removed by *recordari*. And though there is no summons in the writ, yet it gives a good day to the defendant to appear, and if he does not appear, then a *pone* issues, and then a *capias*.

Ld. Raym. 617.

Capias and process of outlawry lie in replevin; for, when on the *pluries replegiari fac'* the sheriff returns *averia elongata*, then a *capias in withernam* issues, and on that being returned *nulla bona*, a *capias* issues, and so to outlawry.—*Capias* and process of outlawry in replevin were given by 25 E. 3, c. 17.

6 Mod. 84.

℞ A writ of replevin tested at one term and returnable at the next but one, (an entire term intervening,) is voidable.

Cayward v. Doolittle, 6 Cowen, 602.

(E) Of the Writs or Processes in Replevin.

When the proceedings upon a writ of replevin, subsequent to the issuing of the process, are set aside by the court, the plaintiff cannot protect himself under such process in an action brought for the property delivered to him by virtue of such writ.

Smith v. Snyder, 15 Wend. 324.

The writ of replevin must specify the goods and chattels to be replevied, or it may be quashed, even after an appearance has been entered.

Snedeker v. Quick, 6 Halst. 179.g

2. Of the *Withernam*.(a)

If on the *pluries* replevin the sheriff return, that the cattle are eloigned to places unknown,(b) &c., so that he cannot deliver them to the plaintiff, then shall issue a (c) *withernam* directed to the sheriff, commanding him to take the cattle or goods of the defendant, and detain them (d) till the cattle or goods distrained are restored to the plaintiff; and, if upon the first *withernam* a *nil* be returned, then an *alias* and *pluries* replevin shall issue, and so to a *capias* and *exigent*.

(a) Vide Bl. Com. 3, v. 148, &c. F. N. B. 73. (b) On what returns made by the sheriff a *withernam* shall issue. Dalt. Sh. 276. (c) *Withernam* is derived from the Saxon words *weder* (other) and *naam* (distress), signifying another distress, instead of the former, which was eloigned. *Velitum namium* signifies a forbidden distress; and therefore though a distress were originally lawful, yet, if it be detained against the replevin, it is *velitum namium* and unlawful. Gilb. Replev. 109; 2 Inst. 140, 141. In the old Northern languages the word *withernam* is used as equivalent to reprisals. Stiernhook de Jure Sueon. l. 1, c. 10.—(d) It is said, that it is the usage in the King's Bench, that they shall be delivered to the plaintiff: by which, it seems, that the form of the writ of *withernam* there is different from that in the register. This is a point that has been several times controverted, and some of the clerks made the distinction between the practice of the King's Bench and Common Pleas. But the true distinction is between the *original* and the *judicial* writ of *withernam*. By the former, the sheriff is to take *et ea delinere donec eidem*, &c., which obliges the sheriff to detain the cattle or goods in his own custody. But in the *judicial withernam* the words are, *capias in withernam, et salvo et securè custodiri facias, donec*, &c., which is to be interpreted, "that he must deliver them to the plaintiff upon good security," for that is making them to be safely kept. The reason of the difference is this, that upon the *viconciel* writ below, where it was found that the beasts were eloigned, the award of taking the defendant's beasts could be only *quousque* he gaged deliverance. For even an execution in the sheriff's court was no more than levying a pain, to make the party perform the sentence of that court; for they could not execute the sentence of that court by changing the property, or delivering it over to the suitor, but by levying pains to make the party perform it. And when the return of *elongata* is made into Chancery, the *withernam* goes out as a *viconciel* process, and is conceived in the same manner as it is below; and therefore in the writ *de executione faciendâ in withernam*, there is no return into the king's courts. But where the *elongata* is returned into the King's Bench or Common Pleas, there the *withernam* goes out as a *judicial* process, and there the courts, who can alter the property, have made it *secundum legem talionis*, viz., that the defendant's goods shall be delivered to the plaintiff to make use of them, until his own are restored. And it was said to be the practice of the King's Bench, because that was the court where the *lex talionis* in the case of murder and mayhem settled the practice. Gilb. Replev. 120, 121.]

The writ of *withernam* ought to rehearse the cause which the sheriff returns, for which he cannot replevy the cattle or goods; so that it does not lie upon a bare suggestion, that the beasts are eloigned, &c.

F. N. B. 69, 73.

If upon the *withernam* the cattle are restored to the party who eloigned them, yet he shall pay a fine for his contempt.(e)

2 Leon. 174. [(e) The writ of *withernam* therefore is *ad respondendum tam domine regi de contemptu, quam parti de damno et injuria*.]

(E) Of the Writs or Processes in Replevin.

Cattle taken in withernam may be worked, or, if cows, may be milked; for the party hath them in lieu of his own.

Leon. 220; Dyer, 280, in margin.

And as the party is to have the use of the cattle, he is not to have any allowance or payment made to him for the expenses he has been at in maintaining them.

Owen, 46; Cro. Eliz. 162; 3 Leon. 235.

Scire facias against an executor, reciting that where replevin was brought against his testator for a cow, and judgment against him *de returno habendo*, which was not executed, that he should show cause why he should not have execution. The executor pleads *plene administravit*, upon which the plaintiff demurred; and Wyld, J., said, that upon the judgment the cow is in the custody of the law, and therefore he ought to have execution; but the doubt is, because the replevin is determined by the death of the party; yet, by him and Rainsford only, being in court, the plaintiff shall have execution, for the defendant cannot be prejudiced; for, if the sheriff return *averia elongata*, he shall not have a withernam but of the goods of the testator; or if there are no goods of the testator, the sheriff can take nothing, but shall return *nulla bona*, and then the plaintiff hath his ordinary way to charge the defendant, if he hath made a *devastavit*; and it was adjudged for the plaintiff.

Pasch. 27 Car. 2, in B. R., Sucklin v. Green.

W sues a replevin, H removes it by *recordari* into the King's Bench, the plaintiff does not declare, and upon that a return awarded to H, upon which the sheriff returns *averia elongata*, and then a withernam was awarded and executed; and now the plaintiff comes and prays he may be admitted to declare, and prays a deliverance of the withernam. It was testified by the clerks, that upon the plaintiff's submission to a fine for not declaring, and that being imposed upon him by the judges, he shall have deliverance of the withernam; and a fine of 3s. 4d. being accordingly imposed on the plaintiff, he then declared, and had deliverance.

Noy, 50, Webb v. Hind; and said, that the course of B. R. is contrary to that of C. B.

If, upon an *elongata* returned, the defendant's cattle are taken in withernam, yet, upon the defendant's appearance, and pleading *non cepit*, or claiming property, the defendant shall have his cattle again; and if they are eloiigned, a withernam against the (a) plaintiff. For, if the property or taking be in question, there is no reason that the plaintiff should have the defendant's cattle.

Ld. Raym. 614. (a) That both the plainliff and defendant may have a withernam, Bro. tit. *Withernam*, pl. 17.

The withernam is but mesne process, and cannot be an execution, because it is granted before judgment.

Ld. Raym. 614; and vide Comb. 201; 2 Salk. 582.

§ In South Carolina, when the sheriff returns *elongata* to a writ of replevin, a writ of *withernam* may issue as at common law.

McColgan v. Huston, 2 Nott & McCord, 444.

The defendant in replevin is not concluded by the return of *elongata*; if, therefore, before the return of the withernam he appears to the writ of replevin, and offers to plead *non cepit*, it will stay the *withernam*.

Swan v. Shemwell, 2 Harr. & Gill, 283. §

(E) Of the Writs or Processes in Replevin.

3. Of the Writ of Second Deliverance.

At the common law, if the plaintiff in the replevin had been nonsuited, either before or after verdict, the defendant who distrained should have had return, but not irreplevisable; so as the plaintiff after nonsuit might have had as many replevins as he would, which was vexatious and mischievous; for remedy whereof the statute of West. 2, (13 Ed. 1, st. 1,) cap. 2, restrains the plaintiff from any more replevins after nonsuit, but gives a writ of second deliverance.

2 Inst. 340.

And if in such writ of second deliverance the plaintiff be nonsuited, or if the plea be discontinued, or the writ abate, or if he prevail not in his suit, return irreplevisable shall be granted.

Inst. 341.

If defendant in replevin has return awarded upon nonsuit of the plaintiff, upon which he sues a writ *de returno habendo*, and the sheriff returns *averia elongata per quentem*, and upon this a withernam is awarded, and upon the withernam the defendant has *tot catalla* to him delivered of the goods of the plaintiff, and thereupon the plaintiff sues a second deliverance; he shall sue it for the first distress taken, and not for the withernam. And this appears by the nature and form of the writ of second deliverance.

2 Roll. Abr. 435.

If a *returno habendo* be awarded to the sheriff after a writ of second deliverance prayed by the plaintiff, this is a *supersedeas* to the *returno habendo*, and closes the sheriff's hand from making any return thereto. And if the sheriff will not execute the writ of second deliverance, the party has his remedy against him.

Dyer, 41; Dalt. Sh. 275.

This statute of Westm. 2, (13 Ed. 1, stat. 1,) gives the writ of second deliverance out of the same court where the first replevin was granted, and a man cannot have it elsewhere; for if he could, then he might (a) vary from the place limited as to this by the statute.

Plow. 206. (a) That the writ of second deliverance cannot vary from the first in year, day, place, or number of beasts, Bro. tit. *Second Deliverance*, pl. 3. But, if the first writ was of a heifer, the second may be of a cow, as by presumption it may in that distance of time grow to such. 26 H. 8, pl. 7.

In replevin the defendant avowed, and the plaintiff being nonsuited brought a writ of second deliverance, whereupon it was moved to stay the writ of inquiry of damages. *Per curiam*,—This is a *supersedeas* to the *returno habendo*, but not to the writ of inquiry of damages; for these damages are not for the thing avowed for, but are given by the statute of 21 H. 8, cap. 19, as a compensation for the expense and trouble the avowant has been at.

Salk. 95, pl. 6, and like point adjudged, Palm. 403; Latch, 72.

[So, it has been determined, that the writ of second deliverance is no *supersedeas* of the writ of inquiry of damages upon the 17 Car. 2, c. 7.

Cooper v. Sherbrooke, 2 Wils. 116.]

Error of a judgment in C. B. in a second deliverance: upon demurrer in pleading, the error assigned was, because there was not any writ of second deliverance certified, and *in nullo est erratum* being pleaded, it was

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moved not to be material, because it is awarded on the roll, and the parties had appeared and pleaded to it; but it was adjudged ill, and reversed for that cause; for there ought to be a writ, and if it vary from the declaration in the replevin, it shall be abated.

Cro. Ja. 424, *Newman v. Moor*.

No second deliverance lies after a judgment upon a demurrer, or after a verdict, or confession of the avowry; but in all these cases the judgment must be entered with a return irreplevisable. But upon a nonsuit, either before or after evidence, a writ of second deliverance will lie, because there is no determination of the matter, and there a writ of second deliverance lies to bring the matter in question; but in the case of a demurrer and verdict, the matter is determined by law; and in the case of a confession, it is determined by the confession of the party.

2 Lill. Reg. 457.

[Where a defendant puts in a plea to the writ of replevin, as, property in a stranger, or in the defendant; and these pleas disaffirming the property of the plaintiff, are by verdict found for the defendant, or upon demurrer adjudged for him; in these cases the defendant shall have return irreplevisable: for there can be no new replevin at common law, as upon a nonsuit, because the court have already given their judgment upon the legality of the caption. For if the property be in the defendant or a stranger, the plaintiff can have no cause to complain; and therefore to grant a new replevin, or, which is the same thing, not to make the return irreplevisable, would be to leave that same point open to an examination, which has already been determined: and no writ of second deliverance can be given by the statute, for that is only upon a nonsuit. But if the defendant pleads property in the plaintiff and I S, which only abates the writ under the present form; or pleads *cepit in alio loco*, which abates the count, and, consequently, the writ; in these cases, as there can be no return without an avowry, so that return cannot, in the nature of the thing, be irreplevisable, because these pleas, only abating the writ, must necessarily allow a writ under a better form. And it were a contradiction to allow a new replevin to the plaintiff for the same beasts, which the court have returned to the defendant irreplevisable. So, if the plaintiff confesseth the plea of the defendant to be true, the defendant shall have return, but not irreplevisable.]

Gilb. Replev. 219; 1 Ld. Raym. 217.]

Note, by the 17 Car. 2, cap. 7, that in an avowry for rent the writ of second deliverance is taken away.(a)

2 Ld. Raym. 188. [3 Bl. Comm. 150.] [(a) It is in effect taken away, because the avowant may have judgment for his arrears and costs, without any return; but if he takes judgment at common law for a return, then the writ of second deliverance lies.]

If the plaintiff in replevin be nonsuited for want of delivering a declaration, if it happened through any cause that would have entitled him to a writ of second deliverance, as sickness of the person employed, &c., the court will order the defendant to accept of a declaration on payment of costs; otherwise the plaintiff would be remediless, the writ of second deliverance being taken away by the 17 Car. 2, cap. 7.

Vent. 64.

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4. Of the Writ de proprietate probandâ, and the Claim of Property.

[The writ *de proprietate probandâ* issues out of the Chancery, or out of K. B. or C. B. When it issues out of the Chancery, it is an original, and goes upon the sheriff's return to the *alias* replevin: when out of either of the other courts, it is judicial, and granted on the return of the *pluries*. The reason why these courts do not grant it till the *pluries* is, that the *pluries* only is returnable there, for the original and *alias* give no day, but are merely *vicontiel*.

Dy. 172, 173. β In Pennsylvania, judicial writs *de proprietate probandâ* do not issue. Weaver v. Lawrence, 1 Dall. 156. γ 2 Salk. 583; Reg. 81.]

If the defendant in replevin claims property, the sheriff cannot proceed, for property must be tried by writ. In this case, therefore, the plaintiff may have the writ *de proprietate probandâ* to the sheriff; and if it be found for the plaintiff, then the sheriff is to make deliverance; if for the defendant, then he is to proceed no further. But, as this is but an inquest of office, if it be found against the plaintiff, he may have a replevin to the sheriff; and if he return the claim of property, yet shall it proceed in the C. B., where the property shall be put in issue, and finally tried.

Co. Lit. 145 b; F. N. B. 77; Dyer, 173; Com. 592. β See the cases in New York, decided under their statutes, relative to claims of property of the writ *de proprietate probandâ*. Mitchell v. Hinman, 8 Wend. 667; Lisher v. Pierson, 11 Wend. 58; Colton v. Mott, 15 Wend. 619; Miller v. Franklin, 17 Wend. 278; Lisher v. Pearson, 15 Wend. 518. γ {See 1 Dall. 156, Weaver v. Lawrence.}

None but he who is party to the replevin shall have the writ *de proprietate probandâ*; so that if upon a replevin the beasts of a stranger are delivered to the plaintiff, such stranger, being no party to the replevin, shall not have this writ.

14 H. 4, 25; 2 Roll. Abr. 431.

The sheriff is to return the claim of property on the *pluries*, before which time the writ *de proprietate probandâ* does not issue, for it recites the *pluries*.

Reg. 83; Com. 595.

The writ *de proprietate probandâ* is an inquest of office, and the sheriff is to give notice to the parties of the time and place of executing it.

Dalt. Sh. 274.

If the defendant claims property in replevin, the plaintiff may have the writ *de proprietate probandâ* without continuance of the replevin, though it be two or three years after, because by the claim of property the first suit is determined.

Moor, 403.

If the party who hath the cattle claims property, the sheriff cannot determine it without a writ *de proprietate probandâ*; and then, if the property be found for the party claiming it, it is but an inquest of office, and the party who made the claim may after sue a writ of replevin, to which property may again be pleaded.

7 H. 4, 46; Com. Rep. 594.

If the defendant has property, and omits to claim it before the sheriff, he may notwithstanding plead property in himself or in a stranger, either in abatement or in bar, though it was formerly held, that property in a stranger could only be pleaded in abatement.

Cro. Eliz. 475; Winch. 26; Show. 402; Salk. 5, pl. 12, 94, pl. 3; 2 Ld. Raym. 984; 6 Mod. 81.

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In replevin, the defendant in his avowry pleads, that the beasts taken belong to a third person, and not to the plaintiff, and therefore prays a return; to which the plaintiff demurs; for on the avowant's own showing he ought not to have return, having admitted the property of the beasts to be in another. But judgment was given for the defendant, for the prior possession was in him, and he hath a right against all others but the right owner, and the plaintiff by his demurrer hath admitted, that he hath no property in them.

Comb. 477, *Barret v. Scrimshaw*.

In trespass for entering the plaintiff's house, and taking away his goods, the defendant justifies by virtue of a replevin out of the sheriff's court in London, and a precept thereupon to J S, an officer, and that he the defendant came in aid of him; plaintiff replies, that before the taking away the goods he claimed property in them, and gave notice thereof to the defendant; and the question upon a special verdict was, whether the taking away, after the claim of property, and notice thereof, did not make him a trespasser *ab initio*? And it was held *per tot. cur.* that he was a trespasser *ab initio*; for though the claim ought to be to the sheriff or officer, and a claim to a person that comes to his assistance be not enough to make the execution legal, if the officer does not desist; yet, if it be notified to him that comes in aid, that claim of property is made, he at his peril ought to desist.

6 Mod. 68, 139, *Leonard v. Stacy*; and vide 2 Mod. 242.

[A man cannot claim property in the county court by his bailiff or servant: and the reason is, for that if the claim fall out to be false, he shall be fined for his contempt, which the lord cannot be, unless he make claim himself; for *nemo punitur pro alieno delicto*. But in the King's Bench one may make conusance and claim property by a bailiff; for *there*, the bailiff is not liable to a fine.

Co. Lit. 145 b; 1 Lev. 90; 2 Keb. 441.]

5. Of the Writ de retorno habendo.

The *retorno habendo* is a judicial writ, that lies for him who has avowed the distress, and proved the same to be lawfully taken; or where, upon the removal of the plaint into the courts above, the plaintiff, whose cattle was replevied, makes default, or does not declare or prosecute his action, and thereby becomes nonsuited, &c. And by this writ the sheriff is commanded to make a return of the cattle to the defendant in the replevin

35 H. 6, 40; *Dyer*, 280; Co. Lit. 145.

A bailiff who makes conusance may have judgment of a return, and consequently, a writ *de retorno habendo* grounded on such judgment.

Co. Ent. 59; and he may sue the sureties or the sheriff, where there is no avowant, or jointly with the avowant, where there is one. 1 Bos. & Pul. 378; 3 Maul. & S 180.]

The writ *de retorno habendo* is not a returnable process.

2 Roll. Abr. 433.

If the defendant hath a return awarded to him, and he sueth a writ *de retorno habendo*, and the sheriff returns on the *pluries, quod averia elongata sunt*, &c., he shall have a *scire facias* against the pledges, &c., according to the statute of Westm. 2, (13 Ed. 1, stat. 1;) and if they have nothing, then he shall have a *withernam* against the plaintiff's own cattle.

F. N. B. 172. [He may sue the obligors in the replevin-bond, assigning for breach

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that the plaintiff did not prosecute with effect, or did not make a return. 5 Barn. & C. 284; 2 Bro. & Bing. 107. || β See Gibbs v. Bull, 18 Johns. 435; Lisher v. Pier-son, 2 Wend. 345. γ

{When goods have been replevied and security given, no lien on them remains in the distrainer. The securities in the bond are substituted in the place of the goods, which are restored to the tenant as his sole property; he may sell them; they may be taken in execution, or become liable to any future lien or encumbrance. Upon the *retorno habendo*, if the identical goods distrained are found in the hands of the tenant, undisposed of and unencumbered, they may be taken by the sheriff; if not, after *elongata* returned, a *withernam* may go against the general goods of the tenant.

2 Dall. 68, Woglam v. Cowperthwaite; Ibid. 131, Frey v. Leeper; 1 Bro. C. C. 427, Bradyll v. Ball.}

6. Of Returns irreplevisable.

Return irreplevisable is a judicial writ directed to the sheriff for the final restitution or return of cattle unjustly taken by another, and so found by verdict, or after a nonsuit in a second deliverance.

2 Roll. Abr. 434.

If the plea be to the writ, or any other plea be tried by a verdict, or judged upon demurrer, return irreplevisable shall be awarded, and no new replevin shall be granted, nor any second deliverance by the act of Westm. 2, (13 Ed. 1, stat. 1,) but only upon a nonsuit.

2 Inst. 340; Dyer, 280.

If upon issue joined in replevin the plaintiff does not appear on the trial, being called for that purpose, yet return irreplevisable shall not be awarded, as in case of a verdict being given, but the party may have a writ of second deliverance, as well as if it had been a nonsuit before deciaration or appearance.

3 Leon. 49.

If a man has return irreplevisable, and a beast dies in the pound, he may distrain anew. So, if the beast dies before judgment.

Hob. 61.

If return irreplevisable be awarded, the owner of the cattle may offer the arrearages; and if the defendant refuse to deliver the distress, the plaintiff may have detainue, because the distress is only in nature of a pledge.

Ld. Raym. 720; ||or upon satisfaction made in court, Lord Coke says. he may have a writ for delivery of the goods. 8 Co. 147 a. *Qu.* the form of this writ? Gilb. Repl. 64; but an action on the case will not lie. 1 Camp. N. P. C. 285; 1 Taunt. 261, Auscomb v. Shore.||

7. In what Manner the Sheriff is to execute and return such Processes, β and of his liability. γ

By the statute of Westm. 1, (3 Ed. 1,) cap. 17, if the party who distrains conveys the distress into any house, park, castle, or other place of strength, and refuses to suffer them to be replevied, the sheriff may take the *posse com.*, and on request and refusal may break open such house, castle, &c., and make deliverance; and this was a necessary law so soon after the irregular time of H. 3.

2 Inst. 193; 5 Co. 93; Dalt. Sh. 373.

If the sheriff returns, that the beasts are enclosed in a park among sav-ages, or in a castle, &c., he shall be amerced, and another writ of replevin

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shall be awarded; for he ought to have taken the *posse com.*, for this was a denial.

F. N. B. 157, Hale's Notes.

If the sheriff return, *quod mandavi ballivo libertatis, &c., qui nullum dedit mihi responsum*, or that the bailiff will not make deliverance of the cattle, these are not good returns; for, by the said statute Westm. 1, (3 Ed. 1,) the sheriff, upon such return made to him by the bailiff, ought presently to enter into the franchise, and make deliverance of the cattle taken.

F. N. B. 157.

If a man sue a replevin in the county court without writ, and the bailiff return to the sheriff, that he cannot have view of the cattle to deliver them, the sheriff, by inquest of office, ought to inquire into the truth thereof; and if it be found by a jury, that the cattle are eloigned, &c., the sheriff in the county court may award a withernam to take the defendant's cattle; and if the sheriff will not award a withernam, then the plaintiff shall have a writ out of Chancery directed unto the sheriff rehearsing the whole matter, commanding him to award a withernam, &c., and he may have an *alias*, and after a *pluries*, and an attachment against the sheriff, if he will not execute the king's command.

F. N. B. 158.

If the sheriff return, *quod averia elongata sunt ad loca incognita*, this is a good return, and the party must pursue his writ of withernam; but, if the sheriff return *averia elongata ad loca incognita infra comitatum meum*, he shall be amerced, for the law intends that he may have notice in his county.

Bro. *Retur. de Br.* pl. 100.

If in replevin the sheriff return, *quod averia mortua sunt*, this is a good return.

Bro. *Retur. de Br.* pl. 125.

It is a good return, *quod nullus venit ex parte querentis ad demonstranda averia.*(a) But it seems the sheriff is not obliged to require this.

Dalt. Sh. 556. (a) Allen, 33. || This case was overruled in *Kempston v. Nelson*, *post*, 554. ||

If the sheriff be shown a stranger's goods, and he take them, an action of trespass lies against him, for otherwise the stranger could have no remedy; for being a stranger he cannot have the writ *de proprietate probandâ*, and were he not entitled to this remedy, it would be in the power of the sheriff to strip a man's house of all his goods. But (b) Keilw. seems to hold, that the action lies more properly against the person who shows the goods.

2 Roll. Abr. 552; Com. Rep. 596. (b) Keilw. 119.

If the sheriff come to make replevin of beasts impounded in another man's soil; if the place be enclosed, and have a gate open to the enclosure, he cannot break the enclosure, and enter thereby, where he may enter by the open gate; but, if the owner hinders him, so that he cannot go by the open gate for fear of death, he may break the enclosure and enter there.

20 H. 6, 28; 2 Roll. Abr. 552.

The sheriff is to return, that the cattle are eloigned, or that no person came to show, &c., or a delivery; but he cannot return, that the defendant *non cepit* the cattle, because it is supposed in the writ, and is the ground of it, which the sheriff cannot falsify.

Ld. Raym. 61; Lutw. 581.

(F) Of what Property and for what Things a Replevin lies.

“The sheriff is responsible that the sureties in the replevin-bond shall prove sufficient on the termination of the trial.

Oxley v. Cowperthwaite, 1 Dall. 349; Pearce v. Humphreys, 14 Serg. & Rawle, 23. See Commonwealth v. Rees, 3 Whart. 124; S. C. 1 Miles, 330.

It is incumbent upon the sheriff to see that the security is good, before he returns the property on a replevin.

Murdoch v. Will, 1 Dall. 341.

On the return of *elongata* to a writ of *retorno habendo*, it is not necessary to sue out a *scire facias* against the pledger.

Gibbs v. Bull, 18 Johns. 435.g

(F) Of what Property and for what Things a Replevin lies.

It is a general rule, that the plaintiff ought to have the property of the goods in him at the time of taking; yet, if the goods of a villain be distrained, the lord of the villain shall have a replevin, because the bringing the replevin amounts to a claim in law, and vests the property in the plaintiff. But in this case, if the goods of a villain be taken by a trespasser, who claims property in them, the lord can have no replevin because the villain had but a right.

Co. Lit. 145. β A general or special property in goods, with the actual or constructive possession, is sufficient to maintain replevin. Haythorn v. Rushford, 4 Harr. (N. J.) R. 160.g

Also in a special case one may have a replevin of goods, though they were not distrained; as, if the mesne put in his cattle in lieu of the cattle of the tenant paravail, whom he is bound to acquit, he shall have a replevin of them.

Co. Lit. 145.

If the lord distrains his tenant's cattle wrongfully, and afterwards the cattle return back to the tenant, yet the tenant shall have a replevin against the lord for those cattle, and shall recover damages for the wrongfully distraining of them, because he cannot have an action of trespass against his lord for that distress, but against a bailiff or servant he may.

F. N. B. 69.

Not only a general property which every owner hath, but also a special property, such as a person has who hath goods pledged to him, or who hath the cattle of another to manure his lands, &c., is sufficient to maintain a replevin.(a) And in such like cases either party may bring a replevin.

Co. Lit. 145. (a) Winch, 26.

A replevin does not lie of things which are *feræ naturæ*, as conies, hares, monkeys, dogs, &c.; but, if things wild by nature are made tame, or are reclaimed, so long as they continue in that condition, they belong to the person who has the possession of them, and he may bring a replevin. And the general rule herein seems to be, that a replevin lies for any thing that may by law be distrained.

2 Roll. Abr. 430; Godb. 124; 4 Co. 54.

A replevin lies of a *leveret*; for it has *animus revertendi*. So, and for the same reason, it lies of a *ferret*: but it is said not to lie for a mastiff-dog, though an action of trespass will.

Bro. Repl. 64; 2 Roll. Abr. 430.

Replevin lies of a swarm of bees.

F. N. B. 68.

(G) Replevin, for and against whom it lies.

Replevin does not lie of trees, or timber growing; nor of things annexed to the freehold, because such things cannot be distrained; but a replevin lies of certain iron belonging to the party's mill. [So, of a lime-kiln.]

F. N. B. 68; 4 Term R. 504.

So replevin does not lie of deeds or charters concerning lands; for they are of no value, but as they relate thereto.

Bro. Rep. 34.

Replevin lies not of money, nor of leather made into shoes.

Moor, 394; 2 Brownl. 139.

If a mare in foal, a cow in calf, &c., are distrained, and they happen to bring forth their young whilst they are in the custody of the distrainer, a replevin lies of the foal, calf, &c.

Bro. Repl. 41; F. N. B. 69; Sid. 82.

Replevin lies for a ship: so, of the sails of a ship.

March, 110; Raym. 232.

It was ruled by Pollexfen, C. J., upon evidence at Guildhall, in replevin for goods taken by order of the East India Company from interlopers in the Indies, that no replevin lies for goods taken beyond the seas, though brought hither by the defendant afterwards.*

Show. 91. * In those cases where replevin will not lie, the party may bring an action of detinue to recover the deeds, goods, &c., *in specie*; ||for replevin lies only for a *taking*, but it seems that it lies for *any* taking, not merely for a distress, *per* Lord Redesdale, 1 Scho. & Lef. 327; and the reason of the decision, Show. 91, was, that the *taking*, which is the gist of the action, was beyond seas.||

¶ If trees be cut down on the plaintiff's land, and converted by the defendant into posts and rails, this is not such an alteration of the property as will prevent the plaintiff from recovering in replevin.

Snyder v. Vaux, 2 Rawle, 423.

Replevin lies for any unlawful taking of a chattel, whether taken under pretence of duress or not.

Pangburn v. Patridge, 7 Johns. 140; Cresson v. Stout, 17 Johns. 116. See Marshall v. Davis, 1 Wend. 109; Clark v. Skinner, 20 Johns. 465.

It does not lie for things fixed to the freehold.

17 Johns. 116. It does not lie for a crop detached from the freehold by cutting it and removing it. De Mott v. Hagerman, 8 Cowen, 220.

In New York, replevin lies for goods taken in execution; they not being at the time in the possession of the debtor in the execution.

Judd v. Fox, 9 Cowen, 259.

Replevin lies for a book of records.

Sawyer v. Baldwin, 11 Pick. 492.¶

(G) Replevin, for and against whom it lies.

HEREIN the general rule is, that he who brings a replevin must have a general or special property in him at the time, and that therefore a lord for a heriot, a parson for a mortuary, shall not have it before seizure; for the seizure vests the property in such cases.

Plow. 281; Co. Lit. 145. ¶ Replevin may be maintained by a receiptor of goods, when he is bound to deliver them by a specific day, or pay the amount of the execution under which the levy was made, although the property be left by him in the possession of the defendant in the execution. Miller v. Adsit, 16 Wend. 335.¶

(G) Replevin, for and against whom it lies.

An executor shall have a replevin of the taking of beasts in the lifetime of his testator; for this affirms the property to remain.

Bro. Repl. 59; Sid. 82; {3 Mass. T. Rep. 321, Pitts v. Hale.}

If the cattle of a feme sole be taken, and afterwards she marry, the husband alone may have a replevin. But it hath been held, that in such case the wife cannot join, for that this action admits and affirms property in the feme at the time of the marriage, which by consequence must have vested in the husband.

F. N. B. 69; Vent. 261; 2 Lev. 107; Sid. 172.

But of the taking of goods which a feme has as executrix, the husband and she may join in replevin.

Bro. Bar. & Fem. pl. 85.

And in a late case where husband and wife brought a replevin, and concluded their declaration *ad damnum ipsorum*, defendant avowed for rent in arrear on a demise for years; plaintiff in bar of the avowry pleaded *non demisit*, and issue being joined on the demise, a verdict was found for the plaintiffs, and 1s. damages; and in arrest of judgment two objections were made, 1st, that husband and wife cannot join in replevin; 2dly, that though they might join in an action, yet it cannot be laid to the wife's damage, she having no property in personal chattels during the coverture. In support of these exceptions were cited F. N. B. 69; 1 Sid. 172; because replevin admits and affirms property in the wife at the time of the marriage, which must necessarily vest in the husband; and the court can make no intendment that they were joint-tenants before coverture, or that the feme had the goods as executrix; but *per cur.*—As to the first exception, though it be generally true that husband and wife cannot have a joint property in personal chattels after marriage; yet, as a man and a woman may have a joint property before marriage, or the wife might have these goods as executrix, and the taking in both cases might be before marriage, we do not see why they may not declare jointly in an action for such taking; and if the law will admit of such a joint action, the fact is admitted by the pleading; for the defendant has not made it a point of contest with the plaintiff, whose the property was at the time of taking; and therefore if there can be a case where husband and wife may join in an action for a personal chattel, we think that after a verdict this ought to be intended that case. As to F. N. B. 69, the book says the husband may have a replevin singly; but this does not prove he may not join his wife with him. And as to 1 Sid. 172, we think the distinction there made not law, and that it is not necessary the husband should sue alone in such cases as affirm a property; but this is expressly contrary to the year-books, and to the opinion in 1 Vent. 261, where it is held they may join in detinue, which affirms property as well as replevin; for the specific goods there are to be recovered. And as to the second exception, this must follow the fate of the first; for if the tort preceded the marriage, the action would survive; and Cro. Eliz. 259 is express, that where damages may survive, they may be assessed to both.

Pasch. 8 G. 2, in B. R., Bourne et ux. v. Mattaire; 2 Stra. 1015, S. C. but not S. P.; Ca. temp. Hardw. 119, S. C.

|| But a declaration in replevin by husband and wife for taking the goods of husband and wife is bad on demurrer, as no interest of the wife appears, and the court cannot intend any, on demurrer.

Serres v. Dodd, 2 New R. 405.

(G) Replevin, for and against whom it lies.

It is not, however, a good plea in bar to an avowry for rent, that before and at the time of the supposed demise, and when the supposed rent became due, the plaintiff was married to one J C; for if it is to be presumed from the allegation of coverture when the rent became due that the coverture continued to the time of the distress, the plea is clearly bad, as in that case the wife alone could have no ground of action, and if this is not to be presumed, still the plea is no sufficient answer to the avowry.

Clarke v. Davies, 2 Marsh. 386; S. C. 7 Taunt. 72.¶

If A takes beasts by the command of B, the replevin may be brought against both, or it may be brought against the commander only, as trespass may be.

2 Roll. Abr. 431. β A mere servant, who as such has charge of goods, cannot maintain replevin; but when he is a bailee he may. Harris v. Smith, 3 Serg. & R. 20.¶

If the beasts of several men be distrained, they cannot join in a replevin; so it is a good plea to say, that the property is in the plaintiff {} and a stranger, and where there be two plaintiffs, that the property is in one.

Co. Lit. 145; 5 Co. 19 a, 38 b; {} 2 Mass. T. Rep. 509, Hart v. Fitzgerald.}

β The assignee of the buyer of a chattel, who has never had possession, may maintain replevin against the seller.

Woods v. Nixon, Addis. 134.

The writ should issue against the person having at the time actual possession of the chattels claimed.

English v. Dalbrow, 1 Miles, 160.

Replevin does not lie by one joint owner; but the objection can be taken only by plea in abatement, when he sues for the whole; if he sues for a moiety, the court will abate the writ, *ex officio*.

D'Wolf v. Harris, 4 Mason, 415. See Ladd v. Billings, 15 Mass. 15; Prentice v. Ladd, 12 Conn. 331.

A tenant in common cannot maintain replevin against his co-tenant.

Barnes v. Bullett, 15 Pick. 71; Wills v. Noyes, 12 Pick. 324.

One Parker agreed in writing to furnish certain goods to the commissary-general of the United States, manufactured or about to be manufactured, for the purpose of paying a debt due to the commissary-general and to one Robert Earp. Held, that the United States could not maintain a replevin for the goods manufactured under this contract. If the action could have been maintained, Earp should have been joined in it.

United States v. Kennon, Peters' C. C. 168.

The plaintiff must have had a right to the possession of the property, at the taking or detention.

Gates v. Gates, 15 Mass. 310; Wheeler v. Train, 3 Pick. 255; Collins v. Evans, 15 Pick. 63.

But possession itself is not requisite.

Baker v. Fales, 16 Mass. 147; Pratt v. Parkman, 24 Pick. 42.

A person having only an equitable title to a note, cannot maintain replevin for it against the legal owner.

Clapp v. Shepard, 2 Metc. 127.

(H) Of the Declaration in Replevin.

A mere bailee has not sufficient interest to maintain replevin.

Waterman v. Robinson, 5 Mass. 303; Perley v. Foster, 9 Mass. 109; Warren v. Leland, 9 Mass. 265.

A brewer who sent beer in his own barrels to a retailer, which he was to pay for as sold, but which he had a right to keep, has a sufficient right of possession to maintain replevin against a person attaching it as the property of the retailer.

Meldrum v. Snow, 9 Pick. 441.

Replevin cannot be brought by joining several persons who have several and distinct interests.

Broderick ads. Ames, 3 Harr. (N. J.) 297.

In Maryland a father may maintain replevin for the property of a child as natural guardian, if such property was taken when the child was under sixteen years of age, although the suit was instituted after he was sixteen, but before he was twenty-one.

Smith v. Williamson, 1 Harr. & J. 149.

(H) Of the Declaration (a) in Replevin.

It hath been holden by some opinions, that the count or declaration in replevin must be certain and particular in setting forth the numbers, kinds, and qualities of the cattle or things distrained; for that otherwise the sheriff cannot tell how to make deliverance of the same.

Cater, 218; Co. 45. ¶(a) The declaration may be entitled of the term of the return of the *recordari facias loquelam*, or, as it seems, of the term in which it is delivered; but if entitled of an intermediate term it is irregular, and the defendant may sign judgment. 5 Taunt. 772. ¶ β A declaration containing an item, among others, of a "lot of sundries," held good after verdict, the defendant having pleaded property in himself, and the issue was on the plea. Warner v. Aughenbaugh, 5 Serg. & R. 1.

As in replevin the plaintiff declared that the defendant took *centum oves matricēs et vervecēs* of the plaintiffs: after verdict for the plaintiff, exception was taken to the declaration, because it did not appear in the declaration how many ewes and how many wethers; and the sheriff is bound to make deliverance of either sort according to the writ; and though he may be informed by the party, so that it is a good return to say, that none came on the behalf of the party to show the beasts, yet he is not bound to require it, but ought to have sufficient certainty within the record; and therefore judgment was given for the defendant; but it was agreed that *oves* without addition had been good enough.

Allen, 33; Still. 71, S. C., Moor v. Cliptam.

But, notwithstanding this case, it seems to be now settled, that a declaration in replevin being certain to a general intent is sufficient, especially if it be after a verdict.

7 Co. 25; Show. 170.

As, where a replevin was brought *quare defend' cepit bona et catalla*, (viz.) *quandam parcell' linteī et quandam parcell' papiri*, defendant avowed for rent: and after verdict for the plaintiff, exception was taken in arrest of judgment that the declaration was uncertain in not specifying the quantities contained in the parcels; and Parker, C. J., who delivered the opinion of the courts, said, that the declaration would undoubtedly have been ill on demurrer; but that the defendant having avowed the taking the goods in the declaration, the avowry had cured the defect, as thereby both parties

(H) Of the Declaration in Replevin.

were agreed what the goods were; and the defendant himself having prayed a return of them, there was no controversy between him and the plaintiff about them; and to oblige the plaintiff to a greater certainty, would have been of no service to the defendant; for if he had demanded 500 reams of paper, and proved only one, he must recover. And as to the difficulty of delivering the goods upon a *returno habendo*, he said there was no weight in that objection; for the sheriff, when he came to make a return, might have the defendant's assistance to show him which were the goods; and he was not obliged to execute the writ without somebody attended to point out the things he was to deliver; ||and it is a good return for him to make *quod nullus venit ex parte defend' ad ostend' averia*. Rast. 570 b, Dalt. Sher. 274;|| and in this case that of *Moore v. Cliptam*, Allen, 33, was fully considered and overruled.

Trin. 1 G. 1, in *B. R.*, *Kempston v. Nelson*, S. C. cited and approved by Lord Hardwicke, Ca. temp. Hardw. 121.

So, in the case before-mentioned of *Bourne v. Mattaire*, where a replevin was brought for fourteen skimmers and ladles; the objection, that the plaintiff had not distinguished in his count how many skimmers and how many ladles, was overruled.

2 Stra. 1015; Pasch. 8 G. 2, in *B. R.*, *Bourne et ux. v. Mattaire*; Ca. temp. Hardw. 119, S. C.

||But where the plaintiff declared that the defendant in "a certain dwelling-house took divers goods and chattels of plaintiff," the court arrested the judgment for the uncertainty of the description; and Gibbs, C. J., said, that in the cases of *Kempston v. Nelson*, and *Bourne v. Mattaire*, there was something to guide the sheriff, but here there was nothing whatever.

Pope v. Tilman, 7 Taunt. 642; 1 Moo. 386. || β A declaration in replevin is sufficient in respect to the description of the property, if it be certain to a general intent, especially after verdict. *Wilson v. Gray*, 8 Watts, 38. See *Warner v. Aughenbaugh*, 5 Serg. & R. 1; *Snedaker v. Quick*, 6 Halst. 179. γ

The plaintiff in his count must allege the taking to be at a certain place, or according to the precedents, *in quodam loco vocat'*, that the defendant may have notice to what he is to answer, and make his title; and therefore the alleging the taking *apud* Dale, or such a vill, is too general and uncertain.

Cro. Eliz. 896; *Ward v. Saville*, Godb. 186; *Brownl.* 176; and vide *Hob.* 16; *Moor.* 678; *Raym.* 34; {*Willes*, 475, *Bullythorpe v. Turner*. But if the defendant does not demur, but pleads to the declaration, the defect is cured. *Id. ibid.*}

In replevin both the vill and place are traversable.

Carth. 186. β The declaration must state a certain place within a village or town; but the omission is cured by the defendant's pleading over. *Gardiner v. Humphrey*, 10 Johns. 53. γ

[The plaintiff declared for taking his cattle at Market Street, and the defendant pleaded *non cepit modo et formâ*; at the trial the plaintiff proved that the cattle were in the defendant's possession at Market Street, where he was driving them to the pound: the defendant proved that he first and originally took them at Hardhall: it was thereupon insisted, that the plaintiff had not proved the allegation in his declaration, that the cattle were taken at Market Street, for that the defendant had proved they were first taken at another place, viz., at Hardhall. But the judge at the trial, and the whole of Common Pleas afterwards, were of opinion that this objection was groundless, because, if the defendant took them wrongfully at

(H) Of the Declaration in Replevin.

first, the wrong was continued to any place where the defendant had them in his custody, and, consequently, the place was well laid in the declaration.

Walton v. Kersop, 2 Wils. 354.

Replevin in London: defendant appears upon an *elongata*, plaintiff declares *quas in quodam loco vocat* the Minorities in London: defendant pleads *non cepit modo et formâ*: at the trial the plaintiff proved the taking at Rotherhithe in Surry: upon which it was objected, that the plaintiff had not proved his issue, for the place is material, and therefore part of the issue under *modo et formâ*. The counsel for the plaintiff admitted, that it was traversable; but insisted, that by not traversing it particularly, the place was admitted, and could not be insisted on upon *non cepit*. But the Chief Justice held, that where the defendant avows at a different place in order to have a return, he must traverse the place in the count; because his avowry is inconsistent with it: but, where he does not insist upon a return he may plead *non cepit*, and prove the taking to be at another place, for it is material. Whereupon the plaintiff was nonsuited.

Johnson v. Wollyer, 1 Str. 507, at Guildhall, *coram* Pratt, C. J.—This case is treated by Wilmot, C. J., in the preceding case of Walton v. Kersop, as a mere *nisi prius* note. But it does not appear here, as it did in that case, that the goods ever were in the place in which the declaration alleges them to have been.

{ Replevin of cattle taken in A. The defendant avowed the taking in A under a demise of certain premises of which B was parcel, and because the cattle were damage-feasant in B, he took them and drove them through A in his way to the pound; and upon general demurrer the avowry was held to be well pleaded.

2 Bos. & Pul. 480, Abercrombie v. Parkhurst.}

|| A declaration for taking the plaintiff's goods at the parish of St. Mary-le-Bow, in the ward of Cheap, in London, without stating any place, is bad on demurrer; but if the defendant plead, the defect is cured.

Bullythorpe v. Turner, Willes, R. 475. || § In replevin for goods not distrained for rent, the declaration is sufficient if the taking be laid in the county. Muck v. Folk-road, 1 P. A. Browne, 60. §

A man may count of several takings, part at one day and place, and part at another day and place.

F. N. B. 68, in the notes to the new edition.

In replevin the plaintiff counted of four oxen taken at divers time and places, and that delivery was made of two, but the other two were withheld to his damage 10s., and this was held sufficient without any severance made as to the damages.

Bro. tit. *Damages*, 42.

In replevin in T the plaintiff declared of the taking of twenty beasts in A and B; *et per cur.*, he need not show how many he took in one vill, and how many in another.

Bro. *Repl.* 48.

The count, as in other actions, must agree with the writ; so that if the writ is *de averiis*, and the count *de averiis et catallis*, this is ill.

3 Keb. 671, *vide* tit. *Pleadings*.

In replevin the writ was in the *detinet*, and the count in the *detinuit*, and this was thought to be a material variance; for in replevin in the *detinet* the plaintiff recovers as well the value of the goods as damages for taking,

(I) Pleas in Replevin.

but, when the writ and count are, that the defendant *detinuit* the goods against pledges, &c., by this it is implied, that the plaintiff has had his goods again; and for this he shall only recover damages for the taking. But the parties agreed to amend.

2 Lutw. 115.

||It is not necessary to insert the price or value of the cattle or goods taken in replevin; and the reason seems to be, because if the plaintiff obtains a verdict he is only entitled to damages for the wrongful taking and costs, but not to the value of the goods taken, as in trespass, for they are delivered to him when replevied.

2 Will. Saund. 320, n. 1, and cases there referred to.||

β When the writ is for the taking and unjust detention of property, the plaintiff cannot declare for the unjust detention only. In general the declaration must conform to the writ.

Nichols v. Nichols, 10 Wend. 629.g

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PLEAS in replevin are generally of four kinds; viz., either, 1st, pleas in bar; 2d, in justification; 3d, by way of conusance; 4th, by way of avowry.

Vide 9 Co. 134.

In replevin the defendant may either justify or avow at his election, with this difference, that if he justifies, he cannot have a return.

3 Lev. 205; 2 Keb. 729.

The general issue in replevin is *non cepit*.

Vent. 249. β As to what plea amounts to the general issue in replevin, and the effect of such plea, see Bloomer v. Juhel, 8 Wend. 448; Coon v. Congden, 12 Wend. 496. By pleading the general issue the right of property in the plaintiff is admitted. Harper v. Baker, 3 Monr. 421.g

[One of several defendants may plead *non cepit*.

2 Lutw. 1101.]

If the defendant in replevin claim property to himself, or a stranger, above, as he may do; though it ought to have been before the sheriff, this does not amount to the general issue, but may be pleaded in bar or abatement; and if the plaintiff demur, the defendant shall have a return without avowing; for it appears the beasts are not the plaintiff's. But on issue *non cepit*, property cannot be given in evidence, for that were contrary to it.

2 Lev. 92; Vent. 249; Salk. 594; 6 Mod. 81, 103; 2 Ld. Raym. 984.

If the defendant in replevin make conusance as bailiff to J S, the plaintiff cannot traverse that he is his bailiff; for it is a matter of which by no intendment he can have knowledge. But, if in bar of the avowry the plaintiff pleads that another had made conusance as bailiff to J S for the same cause, and was barred, he need not show that it was with the privity of J S, for it shall be intended; and if in truth it was without, the defendant may traverse his being ever his bailiff. But the law is, that the plaintiff in replevin may traverse his being bailiff.

Cro. Eliz. 14; Vent. 314; 2 Lev. 210; and vide 3 Lev. 20; Salk. 107, pl. 1, 409.

||This was adjudged in Trevilian v. Pine, where the defendant in replevin made cognisance as bailiff to J S; and plaintiff pleaded *de injuriâ*, &c., *absque hoc* that he was bailiff, to which there was a demurrer; and on argu-

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ment the traverse was held to be well taken, and a difference was observed between an action of trespass *quare clausum fregit*, and trespass for taking cattle on replevin; in the first case the command could not be traversed, but in the two last it might.

Trevilian v. Pine, 1 Salk. 107; 11 Mod. 112; and vide 1 Will. Saund. 347 c, n. 4, (5th ed.)

But this distinction is now overruled, and it is settled that where a defendant in trespass *quare clausum fregit* justifies under the command of the owner of the freehold, the command is traversable.

Chambers v. Donaldson, 11 East, 65.||

In a replevin against the master and bailiff or servant, if the bailiff makes consuance as bailiff, and the master pleads, that he did not take, the servant shall not have any return upon his consuance; for by the plea of the master his consuance is changed into justification.

2 Roll. Abr. 433; Show. 169, cited.

In replevin for mare and colt the defendant pleaded not guilty of the taking within six years; and in support of this plea it was insisted upon, that it was the same in effect with the plea of *non cepit*, and that if the statute of limitations had destroyed the plaintiff's action as to the taking, the defendant could not be guilty of the detaining; and if this were not to be allowed, the statute would be evaded, and could never be a bar in replevin; but *per cur.*, the plea is not good in not answering to the detainer; for it might happen that at the time of taking the mare, the colt was not in being, but might have foaled in the pound; and a thing may be lawfully distrained, but unlawfully detained, as by being put into a castle, &c.

Sid. 81, Arundell v. Trevil.

Prisel in auter lieu is only matter in abatement, and the plaintiff may have a new writ without being put to his second deliverance.

6 Mod. 103; Com. Rep. 122, pl. 85.

In replevin of beasts taken at D, the defendant pleads in abatement that they were taken at another place, *absque hoc* that they were taken at D, and *pro retorno habendo* avows for rent on a lease for years, &c., the plaintiff replies and traverses the lease, &c., this is ill; for though the defendant, when he pleads in abatement, must also avow to have a return, yet the plaintiff cannot answer to it, but must take issue on the other matter; ||for the avowry in such case is only in nature of a suggestion to have a return of the goods.

Vent. 137; ||Salk. 93, 94; Bullythorpe v. Turner, Willes R. 475; 1 Saund. 347, n. 1.;

||The defendant can only plead *non cepit*, or *cepit in alio loco*, in case he never had the cattle in the place in the declaration at all; for if the plaintiff prove that defendant had the cattle in the place in the declaration, the plaintiff will have a verdict notwithstanding the first taking were in an other place. Therefore, if the defendant took the cattle in another place, and only had them in the place mentioned in the declaration in the way to the pound, he must plead that matter specially.

2 Wils. 354; 3 Wils. 295; Abercrombie v. Parkhurst, 2 Bos. & Pul. 480; 1 Will. Saund. 347, n. 1.|| ¶ The plea of *cepit in alio loco*, does not admit the taking as laid in the declaration, and the plaintiff is bound to show his right to recover in the same manner as if the plea of *non cepit* had been interposed. Williams v. Welch, 5 Wend. 290.¶

(K) Avowries and Pleas in Bar.

§ *Riens in arrears* is *quasi* a general issue when pleaded in bar of an avowry.

Bloomer v. Juhel, 8 Wend. 448.

A plea of property in a stranger is good in bar or in abatement, and entitles a party to a return without an avowry.

Harrison v. McIntosh, 1 Johns. 380. See *Rogers v. Arnold*, 12 Wend. 30.

Plea to an avowry for rent, that the avowant demised and transferred the premises to the plaintiff for the residue of the term, and had no interest in the reversion, held good; and a replication that, upon a reference, the arbitrator had by his award given a power of distraining, without averring that such power was a matter in difference, or that he had power to confer it, held ill.

Pascoe v. Pascoe, 3 Bing. N. S. 898. *g*

(K) Avowries in Replevin: And herein, of what Seisin and Services, and of the Certainty required therein; ||and of the Plaintiff's Plea in Bar.||

§ For the following *general rules*, which have a like application to all avowries and cognisances, the reader is indebted to Mr. Hammond's *Nisi Prius*, 465.

First. When the defendant avows, he is said to be both plaintiff and defendant; (a) the former as seeking to recover the chattels; the latter, as destroying the plaintiff's claim to damages. And the plaintiff, when he replies to the avowry, is characterized as both defendant and plaintiff; (b) the former, as destroying his opponent's demand of the chattel; the latter, as upholding his own claim to a compensation. The avowry, also, is styled a declaration, (c) and the reply to it a plea in bar.

(a) 2 Hen. 6, Trin. 7, p. 10, *Carthew*, 179. (b) 1 Hen. 6, Trin. 7, p. 10. (c) *Moore*, pl. 1243, p. 885; 1 Brownl. 183, *Darcy v. Langton*.

Secondly. If the defendant took the chattels in his own right, he should in terms *avow* the act, but if as bailiff to and in right of another, he should use the word *acknowledge*. (d) However, the misprision of the one term for the other is only a formal defect. (e) The form of a cognisance or an acknowledging that the distress was made in another's right, is, merely to allege that the defendant took the chattels *as bailiff*, without adding, and by *command* of the principal. (g) Though if the mode of pleading was now to be settled for the first time, I apprehend, such addition would be considered as essential, because, though he took the distress as bailiff, yet unless a subsequent assent (which is equivalent to a previous command) has been given, he cannot justify the act.

(d) 7 Edw. 3, Trin. 44, p. 38. (e) *Vide Cro. Ja.* 372, *Wheaden v. Sugg*. (g) 4 Mod. 367, *Lamb v. Mills*.

Thirdly. We have shown, that if the defendant had the chattels in the place mentioned in the count, this satisfies the averment that they were taken there, though in reality the fact was otherwise; and if the taking at such place would have been justifiable, the defendant may in his avowry admit that he seized them there; but if it would not, he must necessarily show where he took them, and aver that he had them in the place alleged by the count in his way to the pound, or show by what other accident they came there, and then proceed with the avowry. (h) A formal traverse that the defendant did not take them in the place named by the plaintiff, must not be added, for he has admitted what in contemplation of law amounts

(K) Avowries and Pleas in Bar.

to a taking there, and so there is no inconsistency between the declaration and the defence.(i)

(h) 22 Edw. 4, M. 19, p. 36; 2 B. & P. 480, *Abercrombie v. Parkhurst*. (i) 34 Hen. 6, M. 33, p. 18; 1 Wilson, 219, *Ryley v. Parkhurst*.

Fourthly. If the count has averred, that the *locus in quo* contains a hundred acres, and the avowry affirms that it comprises but thirty, a traverse need not be subjoined,(a) because the plaintiff's averment was wholly superfluous and impertinent, and the case therefore is as if it had never been made.(b)

(a) 1 Leon. pl. 277, p. 193. (b) 20 Edw. 4, M. 6, p. 9.

Fifthly. An avowry that he took the chattels in the *locus in quo*, not adding, *at the same time when*, &c., is unexceptionable, being the usual form of pleading.(c)

(c) 2 Mod. 4, *Wilcox's case*.

Sixthly. If the plaintiff has declared for a *less number of chattels* than were really taken and replevied, the defendant, after avowing the seizure of those mentioned in the count, may (though he is not obliged)(d) aver that he distrained such and such goods in addition to those alleged by the plaintiff, and which have been restored to him, and pray that a writ may be directed to the sheriff, commanding him to ascertain the fact, that if true, cause the surplus chattels to be returned to the defendant;(e) and this without disclosing the cause for which they were taken, for *quoad* these goods the plaintiff is nonsuited. If he omits so to do, he is without remedy.(g)

(d) T. Raymond, 33. (e) 14 Hen. 7, M. 4, p. 1. (g) Cro. Ja. 611, *Snelgar v. Henson*.

Seventhly. If the plaintiff has declared (in the detinuit) for a *greater number* of chattels than were taken, the defendant need not set the matter right; because notwithstanding the number is thereby *quodam modo* admitted, (not being denied,) yet the truth may be shown to the jury, who, should the plaintiff succeed, will measure the damages accordingly.(h)

(h) 1 Leon. pl. 54, p. 33.

Eighthly. Should the plaintiff have *replevied fewer* chattels than were actually taken, the defendant will avow for all, and if he succeeds will have judgment *pro retorno habendo* of those mentioned in the count, and likewise judgment to retain the others which are already in his possession, irreplevisable.(i)

(i) 35 Hen. 6, Hil. 1, p. 40.

Ninthly. The defendant will allege, that he took the goods for and *in the name* of a *distress* for a heriot, or the like, as the case may be.(k)

(k) Dyer, 199, pl. 57.

Tenthly. If there are *two* or more *defendants* they must all *avow* for one and the *same cause*, notwithstanding they may each have taken the chattels on a different account; because if one, for example, avows for rent due to himself alone, and another for rent due to himself alone, and both the avowries are true, neither of them can have judgment for a return, inasmuch as the one is not more entitled to the chattels than is the other, and as the goods ought by law to be restored to the defendants (for it appears that the plaintiff had no right to get possession of them) the court are unable to carry the law into effect by pronouncing the proper judgment.(l)

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There is not the same objection in the case, where *one defendant* avows the taking for *several* distinct causes; because if all are found for him, the judgment may well be that he shall have return and hold until all the demands are satisfied.

(l) 11 Edw. 2, Hil. 337; 10 Edw. 3, M. 5, p. 44. Vide 3 Hen. 6, Easter, 20, p. 44, *per* Martin. Vide 1 Roll. Rep. 35.

The eleventh rule is, that one defendant may plead *non cepit* as to so many of the chattels, and avow taking the residue for one cause, whilst the other defendant may plead *non cepit* to the latter, and avow seizing the former goods for another cause, inasmuch as no difficulties can arise by this mode of proceeding.

The twelfth rule is, that if the avowant states his title incorrectly, he must fail upon a traverse taken to it, although in reality he is entitled to the demand to which he distrained; (a) but if he sets out his title truly, and claims more than is his due, he shall have a return for so much as he can prove himself justly entitled to, and shall be amerced for his false claim of the residue. (b) Thus, if he avows for a rent and claims the whole of it, whereas he is proprietor of two parts only, he must fail if his title is put in issue *modo et formâ* by the replication; but supposing that he is proprietor of the whole, and he alleges that he distrained for twenty pounds arrears, whereas it turns out that five pounds only is due, he shall have a return for the five pounds, and be amerced for his false claim of the remaining fifteen. (c) So, if he avows for rent and a *nomine pœnæ*, and does not show that the rent was demanded, the avowry though bad for the *nomine pœnæ* is good for the rent, and for that a return shall be awarded. (d)

(a) 4 Taunton, 329. (b) 10 Ewd. 3, M. 5, p. 44. (c) Moore, pl. 434, p. 281. Vide 5 T. R. 248, *Harrison v. Barnby*; 6 East, 434, *Forty v. Imber*. (d) 1 Brownl. p. 179, *Howel v. Sambay*. Vide *etiam* 1 Brownl. p. 174, *Pain v. Mascal*.

The thirteenth rule, as it is held by some, is, that if the defendant avows for two distinct causes, and it appears, from his own showing, that the one is a just claim, but that the other is not a sufficient cause in law to warrant the taking, the avowry shall abate altogether. (e) It is elsewhere affirmed, that there is a difference of opinion in the books, whether in such case the avowry is bad in all or for parcel only. (g) And, perhaps, by analogy to the case of a writ, the better opinion may be, that it is partially and not altogether defective.

(e) 11 Rep. 45, *Godfrey's case*. (g) 1 Roll. Rep. 77.

The fourteenth rule is, that if the avowry is for parcel of a demand shown to have accrued due, as for a quarter's rent, the rent being payable half-yearly, it should appear that the residue has been satisfied, because a distress for the parcel could only have been made under those circumstances. (h)

(h) Cro. Car. 104, *Holt v. Sambach*.

The following may be mentioned as the fifteenth rule. One material averment in the declaration is, that the goods were taken in such a place; and if the fact is that they were seized in some other, and also that the defendant never had them in the *locus in quo*, *non cepit* is a sufficient defence. The defendant, however, cannot have a return under this plea, because it is the part of the law in whose custody the goods are, and not for the jury, to award a return, and nothing appears upon the record to warrant such a judgment. Nor can the defendant make avowry in addition to the plea of

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non cepit, because the avowry would admit what the plea altogether denies, namely, the taking. Therefore, if he seeks a return of the chattels, he must plead that he took them in such a place, adding a formal traverse of the place named in the declaration, and then avow the cause for which they were taken.(a) This, though a double plea, is admissible at common law, for the reasons already given.(b)

(a) 22 Hen. 6, Easter, 30, p. 54; 39 Hen. 6, M. 47, p. 35. (b) *Antè*.

The sixteenth rule is, that an avowry need not be verified; and the reason assigned is, because it is in the nature of a declaration.(c)

(c) Co. Lit. 303 a.

Lastly. Inasmuch as the avowant is defendant as well as plaintiff, he necessarily falls within the provisions of the statute of Ann.(d)

(d) 4 Ann. c. 16, s. 4, which permits a defendant in any action in any court of record, to plead as many several matters thereto (with leave of the court) as he may think necessary for his defence.g

An avowry, as has been before observed, is the setting forth, in a declaration, the nature and merits of the defendant's case; and the showing that the distress taken by him was lawful, which must be done with such sufficient certainty as will entitle him to *retorno habendo*. But the cases on this head are of such different natures, that it is difficult to range them in any order: and as the niceties herein are in many instances remedied by late acts of parliament, it may be sufficient to take notice of those that follow.

Vide Danv. 510; 2 Co. 25; 9 Co. 20; 8 Co. 64; Vent. 99; Cro. Ja. 160; Dyer, 280.

In an avowry for a distress for rent, the avowant was to show a seisin, and such seisin, by the statute 32 H. 8, c. 2, must be (e) alleged within forty years (g) next before the making of the avowry or conusance.

Co. Lit. 268. (e) And though by the statute of 21 H. 8, c. 19, the lord need not avow upon any person in certain, yet he must allege seisin by the hands of some tenant in certain within forty years. Co. Lit. 268 b. ||(g) Fifty years in the statute.||

If a man makes a gift in tail, rendering rent, he may avow without laying any seisin, because the reversion gives him a sufficient privity, and he shall count upon the reservation, for that is his title; and where the commencement of the rent appears, seisin is not material.

Bro. *Avowry*, 52; Roll. Abr. 314; 8 Co. 65.

§ In Pennsylvania, an avowry need not state out of what lands or tenements the rent arises, nor when it became due.

Albright v. Pickle, 4 Yeates, 264; Weidel v. Roseberry, 13 Serg. & R. 180; 10 Serg. & R. 92.

In an avowry for making a distress for rent, it is not requisite to allege that the warrant was under seal.

Jenkins v. Pell, 17 Wend. 417.

The defendant in replevin must set out truly and strictly, in his avowry, his authority for making the distress.

Wright v. Williams, 5 Cowen, 501.

The avowant must set forth his title, and allege the estate of which he is seised, or the avowry will be bad.

Shepherd v. Boyce, 2 Johns. 446.g

If A by deed indented makes a feoffment in fee to B and his heirs, ren
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dering 10s. *per annum* to A and his heirs, of which rent A or his heirs have not been seised within forty years, yet the heirs of A may distrain, &c., for the statute must be intended in such cases only, where before the statute the avowant was obliged to allege a seisin, and that was where the seisin was so material, and of such force, that though it was by encroachment yet it could not be avoided in an avowry.

8 Co. 64; Brownl. 169, *Cooper v. Foster*.

So, this statute extends not to a new rent created by act of parliament. Cro. Car. 80; Jon. 233.

If homage be done to the lord, he may avow for all other services, superior as well as inferior, for in doing thereof the tenant takes upon himself to do all other services.

4 Co. 8.

Seisin of rent, suit, &c., which is annual, is a sufficient seisin of escuage, homage, fealty, heriot service, service to cover the hall, and such other casual services as may not fall in forty, ||sixty, or seventy|| years.

4 Co. Bevil's case; 3 Lev. 21, S. P.

But seisin of one annual service is no seisin of another annual service; for in that case it is the folly of the lord if he hath not an actual seisin of the other service itself, when it becomes due yearly.

4 Co. 9.

If the avowant allege a seisin of the rent, this is a sufficient averment that he was seised of homage.

Winch. 31; Hutt. 50.

If there be lord and tenant by fealty and rent, and the tenant make a lease for years, and though the lessor hath done fealty, and constantly paid the rent, yet the lord distrains the cattle of the lessee for rent, (where, in truth, none is due,) and avows upon a mere stranger that never had any thing, as upon his very tenant, for rent arrear; upon the special matter shown, the lessor may join in aid to the lessee, and abate the avowry, and compel the lord to avow upon his tenant in right and in law.

9 Co. 20, 21; 2 Mod. 103, S. C. cited.

If there be lessee for years, and the reversion descend on a feme covert, and after the rent be arrear, and the baron distrain, and the lessee bring a replevin, the baron ought to avow in the name of himself and his wife, and not in the name of himself only, for the avowry is to be made according to the reversion which is in the feme. In this case, as reported in Rolle, a *quære* is made how this could be made good; but in Cro. Ja., S. C., the reason is given, because he had showed the truth of the matter as it was, and had averred the life of the feme, and so the distress well taken, and the rent due to him; and therefore it was adjudged that the avowry was good.

Roll. Abr. 318; Cro. Ja. 442, *Wise v. Bennett*; and vide Mod. 273; 2 Saund. 197 5 Mod. 73.

Coparceners are to join in an avowry for rent; so, of joint-tenants: but tenants in common are to sever in their avowries.

Vide tit. *Joint-tenants*, Ld. Raym. 64.

||And there is no difference in this respect between parceners at common law and co-heirs in gavelkind. Therefore one of several co-heirs in gavelkind cannot avow alone for his share of the rent; but he must avow in his

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own right, with a cognisance as bailiff of his co-heirs; and this he may do, without any express authority from his co-heirs.

Leigh v. Shepherd, 2 Bro. & B. 465.†

One tenant in common cannot avow the taking of the cattle of a stranger upon the land damage-feasant, without making himself bailiff or servant to his companion; ||for the avowry is in the personalty, and like a declaration in trespass, in which tenants in common join.†

Roll. Abr. 320; *Jon.* 253; ||*Culley v. Spearman*, 2 H. B. 386; *Cro. Eliz.* 530, *cont.*†

A commoner may avow the taking of the cattle of a stranger upon the common damage-feasant, though he can have no action of trespass.

Cro. Eliz. 530. β An avowant for distress of cattle of a stranger for rent, need not show that they were *levant et couchant* on the demised premises: it lies with the plaintiff to show that they were not *levant et couchant*. *Wright v. Williams*, 5 Cowen, 338.‡

β An avowry to a rent-charge devised to the wife may be made by the husband and wife, in right of the wife, and although issuing out of a term only.

Wynne v. Wynne, 2 Man. & Gr. 8.‡

||The plaintiff in replevin pleaded in bar that the *locus in quo* from time, &c., ought to be open and common on or before the 15th day of October, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards; that the plaintiff at the time when, &c., put in his cattle, “the same time being when the said field was and ought to be open and common, *as aforesaid*,” held, that the plea was bad for uncertainty, even after verdict, the right of common being too generally described.

Da Costa v. Clark, 2 Bos. & Pul. 257.

A plea in bar to an avowry for taking cattle damage-feasant, that the cattle escaped into the *locus* from a public highway, through the defect of fences, must show that they were *passing in the highway*;—it is not enough to state that they *being* on the highway escaped, for it must appear that they were lawfully there.

Dovaston v. Payne, 2 H. Bl. 527.

If A has the exclusive right to dig paving-stones and tiles in a close, and B has the sole possession of the soil for other purposes, and turns his cattle thereon to depasture; A cannot distrain the cattle as damage-feasant, for breaking and injuring the stones and tiles; for B is not bound to watch or fence them off. And *qu.* whether A could have an action for the damage? and whether A’s right is assignable?

Churchill v. Evans, 1 Taunt. 529.†

Executors and administrators ||of tenants in fee-simple, fee-tail, and for terms of lives of rents,|| may distrain and avow in like manner as their testators or intestates might have done, by the statute 32 H. 8, c. 37.(a)

8 Co. 64, Sir William Foster’s case. ||(a) That this stat. extends to executors of tenants for their own lives, and of tenants *pur auter vie*, vide Co. Lit. 162 a, n. 4, 162 b, n. 1; and *anté*, tit. *Rent*.†

If executors, by the 32 H. 8, c. 37, avow for the arrears of a rent in fee accrued to their testator, they must show that the land continues in the seisin of a tenant who ought to have paid it, or in the hands of some other who claims by or from him, according to the statute.

Cro. Eliz. 547; Co. Lit. 162.

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¶It appears doubtful whether this statute extends to rents due on leases for years; and in a late case, where the defendant in replevin avowed as administratrix of the lessor, who was seised in fee, for rent due in his life from a tenant for years, the court gave judgment for the avowant without deciding this question, on the ground that it did not appear, on the face of the avowries, that the tenancy was for years.

Meriton v. Gilbee, 2 Moo. 48.

And an avowry or cognisance under this statute need not show that the executors had a right to distrain, by showing the rent to be one of that nature to which the statute applies. At least, after verdict, the avowry cannot be objected to on this ground.

Martin v. Burton, 1 Bro. & B. 279; 3 Moo. 608; and see Staniford v. Sinclair, 2 Bing. 193.¶

[Tenant for life of a rent-charge confessed a judgment, and an *elegit* issued, under which the rent-charge was extended: tenant for life died, and the conusee distrained and avowed in replevin for the arrears incurred in the lifetime of the tenant for life: on demurrer it was holden to be a bad distress, and not warranted by the above statute: 1st, Because the case of a conusee is not included in it; 2dly, Because he comes in the *post*, *not under* the tenant for life.

Pool v. Duncombe, Tr. 1657, Bull. N. P. 56.]

In replevin against two, they make several avowries, *each in his own right*, and both avowries abated; for if both the issues should be found for the avowants, the court could not give judgment severally for the same thing.

5 Co. 19.

If one distrain for rent, and before the avowry the estate on which it is reserved determine, the avowry shall be as if the estate on which it was reserved had continued, for the avowant is to have the rent notwithstanding: but, if the distress were for a personal service, then the defendant must have a special justification, for he cannot have the service in *specie* when the estate is determined.

Vent. 250.

Replevin of an ox taken, &c., the defendant makes conusance as bailiff to J S, for that he was seised in fee of the manor of D, and that one D was seised in fee of such a tenement holden of the said manor by rent and heriot service, payable after the death of the tenant, and that D died possessed *de animalibus et catallis*, and because the heriot was not paid, he, by the command of the said J S, distrained, and so made conusance, and the issue was upon the tenure, and found for the defendant. An exception was taken in arrest of judgment, because it does not show what was the best beast which he demanded, nor the kind thereof, nor the price of it. But *per cur.* the avowry was held to be good; for peradventure the avowant does not know what was the best beast; and when the lord distrains, it is because the heriot is eloigned, and the plaintiff having done wrong by his eloignment, he at his peril ought to tender sufficient recompense.

Cro. Car. 260; Major v. Brandwood, Hutt. 176.

But, when the defendant avowed for a heriot service, and the plaintiff pleaded in bar, that the tenant at the time of his death *nulla habuit animalia*; on demurrer it was adjudged for the plaintiff, because the avowry

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was insufficient, for that it did not allege in certain what the heriot should be, *scil.* beast, or other thing.

Hob. 176.

In replevin, the title was by a lease made by a parson, and the avowry was, that A was seised of the rectory of H, and made the lease without showing that he was parson : and, by the court, that would have been a good exception, had it not been said in the avowry, that he was seised *in jure ecclesiæ*, which supplies all.

Noy, 70, Bold v. Waters.

If one avows for parcel of a rent, and does not show how he was satisfied as to the residue, this has been held to be ill ; in like manner it has been said, that an avowry for part of an annuity, without showing how the rest has been discharged, is ill.

Cro. Car. 104 ; Comb. 346 ; and vide 1 Ld. Raym. 154, 644,

If A holds lands of B by certain rent, as of his manor of D, and A conveys those lands to the king, who grants them to J S in an avowry for this rent, B must set forth the special matter, and not avow generally, because the place where, &c., is held of him as of his manor of D, &c., for this is no rent-service, but rent distrainable of common right. Adjudged upon a demurrer, that such general avowry was naught in (a) substance, and not to be amended.

And. 159, 160, Broker v. Smith. (a) For the several forms of an avowry, vide Co. Lit. 269, *bene advocat*, &c., for *bene cognovit*, &c., but matter of form, Jenk. 338 ; Cro. Ja. 372.—*Adhuc aretro existis*, but matter of form, Cro. Ja. 283 ; Dals. 72—*bene cognoscit cap. præd. oco in quo*, &c., but *tempore in quo* omitted. 2 Mod. 4, 5.

In an avowry for a rent-charge the defendant made a title to Jane Stiles, with whom he married *anno* 1603 ; and because at Michaelmas 1597, 20*l.* was arrear, and not paid to him and his wife, he avowed ; and this was adjudged a good avowry ; for the saying it was arrear to him and his wife, was but surplusage, when the contrary appears, he not being then married.

Cro. Ja. 282, Bowles v. Poor ; Bulst. 135, S. C.

So, where the defendant made consuance as bailiff to A, administrator to B, and it appeared that A had a right, but not as administrator, and the consuance stood as bailiff of A, and the rest rejected as surplusage.

Hob. 208 ; Mo. 887, Brown v. Dunnery.

Where an avowry is made for several rents, and it appears part is not due, yet the whole avowry shall not abate.

11 Co. 45.

In avowry for rent, and so many hens for quit-rent, the avowant had a verdict for the whole ; but it afterwards appearing upon the face of the avowry, that the hens were not due at the time of the distress, the avowant had leave to release his damages as to them and take judgment for the rent with his costs.

Ld. Raym. 317 ; Carth. 437, S. C., Morris v. Gelder.

An avowant in replevin may abate his own avowry for part of the rent distrained for, but not after judgment.

Com. Rep. 42, pl. 26.

In replevin J S avowed for a rent-charge, due *anno* 1660, and afterwards he distrained and avowed for another part of the same rent-charge,

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which became due before the said year, and which was against a different tenant: in this case it was held by three judges against Mallet, that the avowant was not stopped by his first avowry in such manner as a lessor is by giving an acquittance for the last gale of rent, but that he may at his pleasure avow for part of his rent at one time, and for part at another, in the same manner as the lord may command his bailiff to distrain for so much rent, and afterwards for the sum due before.

Sid. 44; Raym. 21, *Pamer v. Stabick*. ||Vide Vin. Abr. *Rent*, F. c.||

In an avowry the defendant may say, that B was seised of the place where, &c., and held the same of A by fealty and rent, and so for rent arrear, as bailiff to A, make conusance according to the statute, as in lands held of him; though it has been objected, that when in the beginning he names the tenant, he ought to go on in the same manner, and avow upon him as at common law.*

Cro. Eliz. 146, *Lacey v. Fisher*; Leon. 302, S. C. *Those who distrain for rent or services may avow generally. 11 G. 2, c. 19, § 22, which vide *infra*.

If A holds one acre by knight-service, and 12*d.* rent, and the other in socage and 1*d.* rent, and makes a gift in tail of both acres, without any express reservation of any tenure, the same tenures are by law created between the donor and donee; and though there is but one reversion, yet, because the tenures are several, the donor must make several avowries, for the avowry is made in respect of the tenures.

Co. Lit. 32.

A person cannot make one avowry both for a rent-service and a rent-charge, but he may avow the taking so many cattle for a rent-service, and so many for a rent-charge.(a)

Roll. Rep. 35. (a) He may now, if need require, avow double, by the stat. 4 Ann. c. 16.

And in a replevin for a colt and a cow, the defendant may avow for several heriots, and show that the father of the plaintiff was seised, &c., and show the several heriotable tenures, and death, &c., and that he took the colt and cow *nomine heriotorum*, without showing which he took in respect of the one tenure, and which in respect of the other.

Bulst. 101, 102.

[The defendant avowed for rent under a lease dated the 24th June, *habendum a præd. 24 Jun. &c., virtute cujus* the plaintiff entered the said 24th of June. On demurrer it was objected, that the plaintiff was a disseisor by entering the 24th, when the lease was not to commence till the next day, and, consequently, the possession was not under the lease, but by virtue of a tortious fee. But the court gave judgment for the avowant, for that there was a great difference between this case and an ejectment; for here, be the entry tortious or not, it does not discharge the contract for the payment of the rent.

Macdonnell v. Wilder, 1 Stra. 550; 8 Mod. 54, S. C.]

If a man takes a distress for a thing for which he had not good cause of distress, but had good cause of distress for another thing, if a replevin is brought, and he comes into court, he may avow for which thing he pleases.

Com. Rep. 78; Carth. 44.

An executor of tenant for life of a rent-charge may, pursuant to the statute of 32 H. 8, c. 37, avow for the arrearages incurred in the lifetime

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of the testator, without averring that the place where, &c., was in the seisin of the plaintiff, or that he claims by, from, or under him that was tenant, and it will come more properly on the other side to show the contrary.

Ld. Raym. 173; 2 Lutw. 1227, S. C., Hoel v. Bell.

In an avowry for homage, it need not be shown whether the tenancy came to the tenant by descent or purchase.

Winch, 31; Hut. 50.

A stranger to an avowry can plead nothing in bar thereof but *hors de son fee*, or that which is tantamount; but the right heir, though he be a stranger to the avowry, being made a party by aid *prier*, may plead matter in abatement of the avowry.

9 Co. 20; Mo. 870.

But at common law, where the avowry was made only on the land, as in case of customary profits, as, a fine for alienation, &c., so in case of a rent-charge, the plaintiff might have pleaded any discharge, though he was a mere stranger, and had nothing in the land.

Hob. 108, 109.

If a stranger claims a seignory, and distrains, and avows for the service, the tenant may plead that the tenancy is *extra feodum*, &c., of him, that is, out of the seignory, or not holden of him; but he cannot plead *extra feodum*, &c., unless he takes the tenancy upon himself.

Co. Lit. 1 b.—2 Mod. 104; cited and there said by the Ch. J., that this rule is to be intended in cases of an assize, and that so were all the books cited in Co. Lit. for proof of this opinion.

In an avowry the tenant cannot plead *ne unque seise* of such services generally, because he leaves no remedy for the lord either by avowry or by writ of customs and services, and therefore if he is a tenant in fee-simple, he ought either to disclaim or plead *hors de son fee*.

9 Co. 34.

If in (a) trespass for the taking of goods the defendant justifies by the command of the lord of the manor, of whom the plaintiff held by fealty and rent, and that for non-payment of the rent, he took them *nomine districtionis*, the plaintiff may reply, that the *locus in quo est extra, absque hoc quod est infra feodum*, &c., adjudged upon a special demurrer, it being shown for cause that the plaintiff had not taken the tenancy upon himself.

2 Mod. 103, Sherrard v. Smith. (a) So, in an avowry, a stranger may plead generally *hors de son fee*, and so may tenant for years. 2 Mod. 104.

By the 21 H. 8, c. 19, ||which enables lords to avow for rents and services on the land without naming any tenant,|| all plaintiffs and defendants shall have like pleas and like aid *priers* in all such avowries, conuances, and justifications, (pleas of disclaimer only excepted,) as they might have had before the act.

Co. Lit. 268; Cro. Ja. 127; Mo. 870.

If the defendant avows for, and alleges a seisin of rent payable at two feasts, the plaintiff may say that he holds by the same rent payable at one, *absque hoc* that it is payable at the two feasts, for this is another tenure.

9 Co. 34.

If in an avowry for rent the defendant alleges the tenure to be by fealty, rent, and suit of court, where the true tenure is by fealty and rent only,

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the seisin of the suit is not material; for the tenancy was not originally charged with any service of this nature, and therefore in this case the tenure is traversable.*

Keilw. 31; 9 Co. 36; Cro. Eliz. 799. * Vide *infra*.

But, when the lord gets quiet and peaceable seisin of more rent than is due, because the tenancy is charged with a service of such nature, the seisin is traversable, and not the tenure.

9 Co. 36.

But, unless the tenant (*a*) confess a tenure in part, he cannot traverse the tenure; for he cannot say he holds of a stranger, *absque hoc* that he holds of the avowant; but in that case he ought to disclaim, or plead *hors de son fee*.

9 Co. 35. (*a*) At common law he could not have pleaded non-tenure generally, and therefore he cannot, though the avowry be on the statute. Cro. Ja. 127. ||And the disclaimer is taken away by the statute.||

But, in a *ne injuste vexes, cessavit*, assize, rescous, or trespass, such seisin of more rent shall be avoided, for the tenure, and not the seisin, is traversable.

9 Co. 34.

If the lord avows for services, and alleges seisin by the hands of any one in certain, as by the hand of his very tenant, the plaintiff may plead that the avowant was never seised by his hands.

9 Co. 35.

The seisin of that service is only traversable for which the avowry is made, unless the seisin of a superior service is alleged, which in law is a seisin of that.

9 Co. 35.

The lord of a copyhold may avow in B. R., for a rent issuing out of a copyhold, for this is a duty due and payable at common law.

Cro. Eliz. 524, *Laughter v. Humphry*.

In an avowry for *aid pur file marier*, or *faire fitz chevalier*, it is a good plea in bar to say, that the avowant had not such a son or such a daughter alive at the time of the aid levied.

Dav. R. 2.

In replevin of a cow the defendant avows damage-feasant; the plaintiff prescribes for common for four cows and half a cow; issue on the prescription, and found for the plaintiff: it was moved in arrest, that the issue was senseless and void: but it was adjudged, that if in replevin so much of the prescription be found as will serve the party, though the whole be not found, it is sufficient; and here the action is for one cow only, and the prescription for four is a good justification for putting in one cow.

Lev. 141.

[An avowant prescribed to have common for *all commonable cattle*, and upon issue joined thereon, he gave in evidence prescription for common *for sheep and horses only*: it was holden, that this did not maintain the issue, for a prescription is an entire thing. But, if he had had a general common, that is, for *all kinds of cattle*, and had prescribed for common *for any particular sort*, it would have been good, for it is within the general prescription.

Pring v. Henley, per Ward, C. B., at Exeter, 1700, Bull. N. P. 59.]

(K) Avowries and Pleas in Bar.

An averment in an avowry of a demise for *three* years is not supported by proof of a lease for one year certain and two years further possession on the same terms by consent of the landlord.

4 Cran. 299, *Alexander v. Harris.* }

¶ And if a party prescribe for common for all commonable cattle, and prove that he has turned on all the cattle he kept, but that he never kept *sheep*, this is evidence to go to the jury of a right for all commonable cattle.

Manifold v. Pennington, 4 Barn. & C. 161.

In an avowry defendant averred, that all those whose estates he now has, &c., from time whereof the memory of man is not, &c., have been accustomed to have, and of right during all the time aforesaid ought to have had, and still ought to have, common of pasture in the *locus in quo*; this was held bad, since it did not amount to an averment of right of common at all times of the year.

Hawkins v. Eccles, 2 Bos. & Pul. 359.¶

In replevin the plaintiff entitles himself by a lease of the 3d of March; the defendant traverses the lease *modo et formâ*; the jury find a lease of another date, yet judgment was given for the plaintiff; for the substance of the issue is, whether he has a lease or no: yet, if they had found a lease from another, it would not do; but, if he had declared thus in ejectment, it had been against him, for there he is to recover the term, and is to make his title truly.

Hob. 73; *Lev.* 141; 2 *Lev.* 11.

{ In replevin the defendant stated in her avowry that by lease and release she, in consideration of an annuity therein mentioned, conveyed certain premises containing the place where, &c., to the plaintiff in fee, subject to a rent-charge payable to the defendant during her life, with power of distress for non-payment of the annuity; and that by virtue of the lease and release, &c., the plaintiff became seised in fee, &c.; and then she justified, &c., as a distress for non-payment of the annuity. The plaintiff pleaded in bar, 1, that the plaintiff never was seised in fee: 2, (admitting that the defendant did by lease bargain and sell, &c., to the plaintiff for a year,) that at the time of making the bargain and sale the defendant was only seised for her life, the reversion in fee then belonging to another, traversing that the defendant was seised of the reversion in fee. On demurrer, both pleas were holden bad; the first because it denied what was in effect admitted before, as the plaintiff had not denied, even by way of protestando, that the defendant was seised in fee when she made the lease and release, and because it traversed only a consequence of law; the second, because it admitted that the defendant had an estate sufficient to justify the distress.

Willes, 378, *Grills v. Mannell.* }

Where there is a custom for the lord to seize the best beast for an heriot, the lord in his avowry need not allege that the beast seized by him was the best; but this is a matter that must be shown by the other side, and pleaded to the avowry.

Mod. 63.

So, though the cattle of a stranger cannot be distrained unless they were *levant and couchant*, yet it must come on the other side to show that they were not so.

Mod. 63; [3 *Will. Saund.* 289 a, n. 6, 7.]

(K) Avowries and Pleas in Bar.

[[A plea in bar to an avowry for taking cattle damage-feasant, that the cattle escaped into the *locus in quo* from a public highway, through defect of fences, must show that the cattle were *passing* on the highway when they escaped; it is not enough to state, *being* in the highway.]

Dovaston v. Payne, 2 H. Bl. 527.]

In replevin for taking *bona, catalla, et averia*, &c., the defendant made conusance for taking *averia* only, for that a rent-charge of 100*l. per annum* was granted out of the lands, &c., payable half-yearly at Michaelmas and Lady-day; that the 33*l.*, parcel of 50*l.* for half a year's rent being behind and unpaid, he distrained, and so justifies the taking, *et petit judicium*, &c.: upon demurrer to this avowry it was held to be insufficient, because it did not show when the other 17*l.* were paid to make up the half-year's rent: besides, the action was brought for taking *bona, catalla, et averia*; and the defendant avowed the taking *averia* only, which is an answer only for the live cattle, and not for the whole; so that for these reasons the plaintiff had judgment.

4 Mo. 402, Hunt v. Brains.

In replevin for taking live cattle and several stacks of hay, &c., defendants plead *bene cognoscunt captionem averiorum et catallorum in loco præd. quia dicunt quod averia præd.*, &c., but say nothing as to the chattels; but they conclude and pray judgment *averiorum et catallorum*; and this was held ill; for when they acknowledge the taking the whole, a justification as to a part cannot be a full and sufficient answer.

5 Mod. 77, Johnson v. Adams et al.

The defendant in replevin cannot have a return of more cattle than he avows for.

Cro. Ja. 611.

In an avowry the issue was, whether the place where, &c., was the freehold of the avowant or not; and it was found by the verdict, that it was the freehold of the avowant's wife; *et per cur.* it is found against the avowant; for when he saith *his* freehold, it is to be intended his sole freehold, and in his own right.

Cro. Eliz. 524, Bonner v. Walker.

In replevin the issue was, whether the plaintiff held of the defendant such land by fealty of rent of 3*s. 4d.* and suit of court, and the avowry was for the rent. The jury found a special verdict, that the plaintiff held by fealty and rent only, and not by suit of court, &c., and if by this verdict the defendant shall have return, was the question; and the court held that it was found against the avowant, for in an avowry all the tenure alleged is material; but, in trespass or rescous, if any part of the tenure be found it is sufficient.

Cro. Eliz. 799, Lewis v. Bucknall.

[The defendant avowed under a custom, that the lord of the manor was entitled, upon the death or alienation of every tenant, to the second best beast, and if but one, then to that beast; and if no beast, then to a compensation in lieu of it. Upon evidence the custom appeared to be as stated, but with an exception of mesne seignories, burgage-tenures, and alienations to the use of the alienees and their heirs: and the avowry for the omission of that exception was adjudged to be ill.]

Griffin v. Blandford, Cowp. 62.]

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In replevin the defendant avowed for rent, and showed that his father was seised, and leased for years, &c., and that on his death the lands descended to him. The plaintiff in bar said, that the father devised the lands to J S, and issue being joined herein, it was found by special verdict that the lands were holden by knight-service, so that the devise was only of two parts, and that the third descended to the heir at law, the avowant; and on (a) this finding it was held, that the avowant should have judgment.

Winch, 49, Clotworthy v. Mitchell. (a) Where there were two issues, and one only found for the avowant, he had judgment. Cro. Ja. 442, where the parties agree in the facts, the jury's finding otherwise not material. 2 Lutw. 1216; 2 Mod. 4, 5.

And (b) avowry is in nature of a declaration, and it sufficeth if it be good to a common intent.

Lev. 77. β Albright v. Pickle, 4 Yeates, 264; Weidell v. Roseberry, 13 Serg. & R. 180; Franciscus v. Reigart, 4 Watts, 98; Loomis v. Tyler, 4 Day, 141. Informalities in an avowry are cured by going to trial. Kessler v. McConachy, 1 Rawle, 435. (b) It must show the certainty of the place, day, and cattle, to entitle the avowant to a writ of inquiry of damages. Dyer, 280.

The claim of right to distrain must be made out by the avowant against the plaintiff, who claims property in the distress.

6 Mod. 103.

And there is no difference between an avowry and justification, for whatever is set forth in either must be maintained.

6 Mod. 159.

The defendant in replevin, to entitle himself to a return of the goods distrained, must make his avowry, unless it be in such case in which he claims property; so that though the plaintiff's writ abates, yet the defendant is not entitled to a *retorno habend.* unless he had made his avowry.

Show. 402; Comb. 196; 3 Lev. 204; Ld. Raym. 217.

The bailiff, who distrains for damage-feasant in right of a devisee, must set forth what estate the devisor had; and it is not sufficient to say in general, that he was seised.

Cro. Eliz. 530.

Seisitus fuit not sufficient in an avowry, but the party must set forth in fee, tail, for life, &c.

Carth. 9.—That the general rule of pleading is, that where a title is made under a particular estate, the commencement of that estate must be shown, but that an estate in fee may be alleged generally. Carth. 445; Ld. Raym. 332; 2 Salk. 562; 6 Mod. 223; 2 Lutw. 1217, 1231; Comb. 27, 473, 476.

||But it is sufficient to allege the *soil and freehold* in the avowant; and this is an anomalous case, it being against the common rule of pleading to say, "his soil and freehold" generally: for it applies as well to an estate in tail, or for life, as to an estate in fee, and if the avowant be seised either in tail or for life, he ought to show regularly the commencement of it. 1 Lord Raym. 333. But as this form has prevailed in avowries ever since the time of Henry the Sixth, at least, the courts allow it. In Bro. *Avowrie*, 80, which is an abridgment of 21 H. 7, 12, it is said, "It is a good avowry that the place where, &c., the day of the taking, was his *freehold*, and he took them damage-feasant, *quod nota per justic.* And Mordant, prothonotary, said, that he had seen such precedents in the time of the now king, wherein the avowry was awarded good; and Broke adds, that in M. 4 E. 6, it was agreed, that to say that the place where, &c., is four acres, and was, at the time of taking, *his*

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freehold, wherefore he took them damage-feasant, was a good avowry, and the same law in the case of Wimbish, which was much argued, *quod nota, et concordat*, 10 H. 6." So in Bro. *Avowrie*, 105, 122. Nay, in Bro. *Avowrie*, 72, (9 Ed. 4, 28,) "exception was taken that the defendant said he was *seised in fee* of the place, instead of following the *ancient form* of its being his *freehold*. But Moyle said, it is the better form, for freehold rests in three sorts, and therefore more uncertain." So is Owen, 51. Still, however, to say he is *seised*, generally, without saying of *what estate*, is bad on special demurrer. 2 Lutw. 1231, 1232, Saunders v. Hussey; S. C. Carthew, 9; 1 Ld. Raym. 332, 333.

1 Will. Saund. 347 d, n. 6.

The difficulty of deducing the title, from tenant in fee-simple down to the termor for years, it is presumed, gave birth to a late attempt to overturn the established rule of pleading, which requires a party to show in pleading the commencement of the term, which Lord Holt, in the case of Scilly v. Dally, calls a *fundamental rule which ought not to be broken upon fancied inconveniences*, by comparing the declaration in replevin to what it is nothing like, namely, to an action of trespass for taking goods; and, instead of avowing and praying a return of the cattle, pleading a plea of justification that the defendant took them damage-feasant, beginning and concluding in bar: and as the defendant to an action of trespass for taking cattle may plead generally that he was *possessed* of a close, and took the cattle damage-feasant, so it was contended the defendant might do in a plea to a declaration in replevin, justifying taking damage-feasant. But the Court of Common Pleas put an effectual stop, it is to be hoped, to this innovation, by determining that such a plea could not be supported, and militated against an established rule of pleading. The case alluded to was, where in replevin the defendant pleaded by way of justification, beginning in the form of a plea, that before and at the time when, &c., he was *possessed* of a messuage with the appurtenances; and, being so possessed, was lawfully entitled to common of pasture in the said place, in which, &c., and distrained as a commoner the cattle damage-feasant, and concluded by praying judgment *si actio*, &c.; and on demurrer the court stopped the counsel who was to have argued against the validity of the plea, being clearly of opinion that the plea could not be supported, and gave the defendant leave to amend.

2 Salk. 56; Carth. 444; Comb. 476; Hawkins v. Eccles, 2 Bos. & P. 359; 2 Will. Saund. 284 a, n. 3.

If one avow for rent, he must show his title and tenure in particular, and the defendant may traverse any part which he sets forth: *secus* for damage-feasant.

6 Mod. 158.

But now, by the 11 G. 2, c. 19, "It shall be lawful for all defendants in replevin to avow or make conusance generally, that the plaintiff in replevin, or other tenant of the lands whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then and still remains due, or that the place where the distress was taken was parcel of such certain tenements held of such honour, lordship, or manor, for which tenements the rent, relief, heriot, or other services distrained for, were at the time of such distress and still remain due, without further setting forth

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the grant, tenure, demise, or title of such lessors or owners of such manor; and if the plaintiff in such action shall become nonsuit, ||discontinue, or have judgment against him,|| the defendant shall recover double costs.”(a)

||This statute does not extend to an avowry for a rent-charge. 1 New R. 56. (a) This clause does not extend to a case where the suit is referred before issue, and the arbitrator awards in favour of defendant. Gurney v. Buller, 1 Barn. & A. 670.||

{A rent-charge is not within this statute, and therefore cannot be avowed for in the way pointed out by it.

4 Bos. & Pul. 56, Bulpit v. Clarke. And see Willes, 429, Lindon v. Collins.}

Where the rent reserved at the time of entering upon the premises was afterwards varied by agreement between the parties, yet it was holden, that the landlord might avow as on a demise at a rent certain, for that such subsequent agreement operated by relation to make it a reservation of the rent from the beginning.

M^cLeish v. Taite, Cowp. 781.

The defendant may avow in this general manner, whether the plaintiff be tenant or not, for the words of the statute are in the disjunctive, “Plaintiff in replevin or other tenant.”

Sullivan v. Stradling, 2 Wils. 208.

Nil habuit in tenementis, is not pleadable to an avowry under the statute.

Sullivan v. Stradling, 2 Wils. 208. ||Parry v. House, Holt’s Ca. 489, and the reporter’s note.||

||But although the tenant cannot dispute the title of the landlord under whom he originally enters, yet, where he has acknowledged the title of another person by payment of rent, he is not precluded from showing the facts under which he paid it; and this he may do on the plea of *non tenuit modo et formâ*, if such person distrains and avows upon him.

Rogers v. Pitcher, 6 Taunt. 202; and vide 1 Bos. & Pul. 326.

And though the plaintiff cannot dispute the title of his landlord, he may show it expired.

Neave v. Moss, 1 Bing. 360; and see Balls v. Westwood, 2 Camp. 11.

If an indenture of demise be specially stated in the avowry, the plaintiff may plead *non est factum*.

5 Moo. 475.||

Heriot customs are not within this clause of the statute, which mentions services only, and therefore double costs were refused the avowant upon a nonsuit.

Loyd v. Winton, 2 Wils. 28.

To an avowry for rent by a tenant, his under-tenant may plead payment of the ground-rent which he paid to the original landlord to protect himself from a distress: for that is a good payment of so much rent to the tenant, which is paid as part of the rent itself in respect of the land.

Sapsford v. Fletcher, 4 Term R. 511.

||So, also, where at the time of the demise to the tenant the premises are subject to an annuity, charged upon them by a party interested before the lessor’s title commenced, with a power of distress, the tenant may pay the rent to the grantee of this annuity under a threat of distress, and plead such payment in bar to an avowry by his lessor.

Taylor v. Zamira, 6 Taunt. 524; 2 Marsh, 220, S. C.; and see Dyer v. Bowley, 2 Bing. 94.

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But the tenant cannot plead in bar payments of land-tax and paving-rates for the landlord, for a period preceding the current year in which the rent avowed for grows due; for he ought to have deducted those payments out of the next rent after they were made, according to the fair construction of the land-tax act, 38 G. 3, c. 5, § 17; and such payments cannot be recovered back from the landlord.

Andrews v. Hancock, 1 Bro. & B. 37; Stubbs v. Parsons, 3 Barn. & A. 516; and vide 1 Barn. & A. 123; 3 Taunt. 76.

The plaintiff cannot plead *de injuriâ suâ propriâ absque tali causâ* to an avowry; for, by the second resolution in Crogate's case, 8 Co. 66 b, where the defendant, in his own right, or as servant to another, claimeth an interest in the land, or to any common or rent going out of the land, or to any way or passage upon the land, there *de injuriâ*, &c., generally, is no plea.

Jones v. Kitchin, 1 Bos. & Pul. 76; and vide Willes, R. 99.

On an avowry for half a year's rent the avowant may recover, though only a quarter appears due.

Harrison v. Barnby, 5 Term R. 246.

And if the defendant avow for 120*l.* rent, and the plaintiff plead in bar "that the said 120*l.* is not due," without adding, "or any part thereof," (as is the proper pleading,) and the defendant join issue, and on the trial it appear that only 24*l.* is due, on which the plaintiff objects that the defendant's evidence does not support the issue, and a verdict is taken by the defendant for the 24*l.*, subject to the opinion of the court; such verdict will cure the defect in the formality of the issue.

Cobb v. Bryan, 3 Bos. & Pul. 348.

So, also, where the defendant made cognisance for two years and a quarter rent, and alleged that for a long time, viz., for two years and a quarter, ending on a certain day, the plaintiff held and enjoyed the premises as tenant to A B, and the plaintiff pleaded that he did not hold in manner and form, &c.; it was held sufficient for the defendant, in order to have a verdict, to prove that the plaintiff held and enjoyed the premises for two years, whereby he was entitled to recover two years' rent.

Forty v. Imber, 6 East, 434.

The plaintiff may plead in bar *non tenuit*, &c., together with a plea of infancy.

Wilson v. Ames, 1 Marsh. 74.

It is not a good plea to an avowry, that the landlord took a distress for the same rent, of sufficient value to satisfy it, unless it be also averred that the rent was thereby satisfied.

Lingham v. Warren, 2 Bro. & B. 36; Hudd v. Ravenor, 2 Bro. & B. 662; and vide 1 Barn. & A. 157.]

§The plea of *non cepit* admits the property to be in the plaintiff, and puts in issue only the taking and detention.

M-Kinley v. M-Gregor, 3 Whart. 370; Buckley v. Handy, 2 Miles, 449.

The plea of *riens in arrere* to replevin for goods taken on a distress for rent, admits the existence of a tenancy.

Hill v. Miller, 5 Serg. & R. 357; Williams v. Smith, 10 Serg. & R. 202.

The want of a plea in replevin is error, which is not cured by the parties having given bonds to the sheriff, nor by a trial on the merits.

Lecky v. McDermott, 5 Serg. & Rawle, 331.

(L) Of the Judgment in Replevin.

Under a plea of no rent in arrear, to an action of replevin by a sub-lessee, for goods taken by the paramount landlord, on a distress for rent, a receipt given by the immediate lessee to the plaintiff is not admissible in evidence for him.

Quinn v. Wallace, 6 Whart. 452. *g*

[A tender and refusal may be pleaded to an avowry for rent without bringing the money into court, because, if the distress was not rightfully taken, the defendant must answer the plaintiff his damages.

Bull. N. P. 60. *β* See Knight v. McDowall, 4 Perr. & D. 168. *g*

But the plaintiff cannot plead a set-off, because this action is founded in tort, and the 2 G. 2 does not extend to such actions. Another reason why it may not be pleaded is, because a set-off supposes a different demand arising in a different right. Neither can a mutual demand be given in evidence, where the defendant justifies under a distress.

4 Term Rep. 510. Bull. N. P. 181, (5th ed.) ||1 Bro. & B. 47. || *β* A set-off is not allowable in replevin. Fairman v. Fluck, 5 Watts, 516; Beyer v. Fenstermacher, 2 Whart. 95; Peterson v. Haight, 3 Whart. 150. See Gray v. Wilson, 4 Watts, 39; Swing v. Sparks, 3 Halst. 29. *g*

After an avowry for rent arrear, the plaintiff may pay the rent into court for which the defendant avows, because the demand is certain; but not where the damages are unliquidated.

Vernon v. Wynne, 1 H. Bl. 24; Barnes, 249; 2 Salk. 596.]

{If less rent is due than the defendant has avowed for, he is entitled to recover so much as is due.

5 Term. 248, Harrison v. Barnby; 6 East, 434, Forty v. Imber; 3 Bos. & Pul. 348, Cobb v. Bryan.

The plea of *no rent in arrear* admits the demise as laid in the avowry.

4 Cran. 299, Alexander v. Harris; 2 Esp. Rep. 669, Hill v. Wright; Buller, 59. }

||Where an avowry states that the plaintiff held the premises at a certain yearly rent, to wit, the yearly rent of 72*l.*, and the plaintiff pleads in bar *non tenuit modo et formā*, and 2dly, *rien in arrear*; and the rent appears to be 72*l.* 9*s.*, it is a fatal variance, and there must be a verdict for the plaintiff on the first issue; and the second plea thereby becomes immaterial, and the proper course is to discharge the jury from finding any verdict upon it; but if any verdict is entered, it must be entered for the plaintiff.

Cossey v. Diggons, 2 Barn. & A. 546; and see Brown v. Joyce, 4 Taunt. 320. *β* On pleas to an avowry for 20*l.*, a half-year's rent, *non tenuit*, and as to part, *rien in arriere*: it appearing by the lease that the rent reserved was 40*l.*, but under the signatures was written a memorandum before the execution, "the allowance for the road to be made as usual;" held, not an alteration of the rent, but operating as a mere covenant, and not supporting the plea *non tenuit*. Davies v. Stacy, 4 Perr. & D. 157. *g*

If defendant states in his avowry that plaintiff held the closes in which, &c., at a certain rent, and it appear in evidence that he held those closes *and two others* at that rent, the variance is not fatal, for each close is subject to the whole rent.

Hargrave v. Shewin, 6 Barn. & C. 34. See Philpott v. Dobbinson, 6 Bing. 105. ||

[(L) Of the Judgment in Replevin.

ON the execution of the writ of replevin by the sheriff, the beasts distrained are actually returned to the plaintiff, so that he hath the possession and use of the cattle pending the suit; consequently, if the plaintiff in replevin hath judgment, it can only be for damages; and therefore the entry

(L) Of the Judgment in Replevin.

is, "*quod* (the plaintiff) *recuperet versus* the defendant, *damna sua occasione præmiss., sed quia nescitur quæ damna præd.* (the plaintiff) *sustinuit occasione præmiss., a writ of inquiry is awarded to inquire; quæ damna præd.* (the plaintiff) *sustinuit tam occasione præmiss., quam pro misis et custagiis suis, per ipsum circa sectam suam in hac parte appositis.* And on the return of this inquisition, the plaintiff hath final judgment, *quod recuperet versus præfatum* (the defendant) *damna sua præd. ad, &c., per inquisitionem præd. in formâ præd. comperta, nec non, &c., eidem* (the plaintiff) *ad requisitionem suam pro misis et custagiis suis præd. per curiam hic de incremento adjudicata; quæ quidem damna in toto se attingunt ad, &c., præd.* (the defendant) *in misericordiâ."*

Gilb. Repl. 201; Co. Ent. 573 b; 2d Book of Judgment, 203; Carth. 362; 5 Mod. 118; Salk. 205; Co. Ent. 575 a.

This writ of inquiry must be understood to issue where the plaintiff hath judgment on a demurrer, &c., and not on a verdict; for if there be a verdict for the plaintiff, the jury on that verdict ascertain the damages that the plaintiff hath sustained by the unjust caption and detention, and also the costs of suit, and then there is no occasion for a writ of inquiry. The judgment is, "*quod* (the plaintiff) *recuperet versus* (the defendant) *damna prædicta per juratores prædictos in formâ prædictâ assessa, nec non, &c.—pro misis, &c., de incremento adjudicata, &c.* And the defendant *in misericordiâ."*

On the other hand, if judgment be for the avowant on demurrer, then the entry is, "*quod* (the plaintiff) *nil capiat per breve suum præd., sed sit in misericordiâ pro falso clamore suo, et præd.* (the defendant) *eat inde sine die, &c., et habeat retorum averiorum præd. detinend. sibi irrepleg. in perpetuum, et qualiter, &c., vic constare faciat hic, &c., et quod præd.* (the defendant) *damna sua occasione præmiss. recuperare debeat; sed quia nescitur," &c.*

Co. Ent. 572 b; 2d Book of Judgment, 205.

But if there be a verdict for the avowant, the jury in that verdict ascertains the damages, and then there needs no writ of inquiry; but the judgment is entered, "*quod* (the defendant) *habeat retorum averiorum prædictorum, &c. Consideratum est etiam quod præd.* (the defendant) *recuperet versus præf.* (the plaintiff) *damna sua præd. &c., per juratores præd. in formâ præd. assessa, nec non, &c., eidem* (the defendant) *ad requisitionem suam pro misis et custagiis," &c.*

2d Book of Judgm. 206. *β* Easton v. Worthington, 5 Serg. & R. 132.g

So that wherever the judgment is given on a verdict, either for plaintiff or defendant, that verdict ascertaining the damages, there needs no writ of inquiry to issue; but, where the judgment is not founded on a verdict, but on a demurrer or *non pros.* of the plaintiff, &c., there, the damages must be ascertained by a jury on a writ of inquiry; because what damages either party hath sustained, is a matter of fact, and therefore to be settled by a jury. But, if both parties consent that the court shall settle the damages without a jury, then the entry is, "*super quæ justic. hic ad petitionem ipsius* (the defendant) *ex assensu præd.* (the plaintiff) *assident damna ipsius* (the defendant) *occasione præmiss., &c., ultra misas," &c.* And this judgment is good, *quia consensus tollit errorem.*

2d Book of Judgm. 206.

In an action against two defendants, where one avowed and the other

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made cognisance for taking the distress for rent in arrear, and the plaintiff in his plea in bar said nothing was in arrear, on which issue was joined, the court held that a judgment entered that the defendant should have a return of the cattle, and recover his damages and costs assessed by the jury, was good, either as a judgment at common law, though the return be not adjudged irreplevisable, or as a judgment under 21 H. 8, c. 19, which entitles the defendants to damages and costs; because now in point of law the return is irreplevisable. Besides, it is an invariable rule, that if a judgment be more favourable for the plaintiff than he is entitled to, he cannot take advantage of it, because he is not injured by it.

Gammon v. Jones in error, 4 Term. Rep. 509. || See 1 Saund. 195 c. (5th edit.)||

By the 17 Car. 2, c. 7, it is enacted, that "wherever the plaintiff in replevin, upon a distress FOR RENT, shall be nonsuit before issue joined, in any court of record, the defendant making a suggestion in nature of an avowry or cognisance for the rent in arrear, to ascertain the court of the cause of the distress,—the court, upon his prayer, shall award a writ to the sheriff, to inquire of the sum in arrear, and the value of the goods or cattle distrained. And that, upon the return of such inquisition, the defendant shall have judgment to recover against the plaintiff the arrearages of rent in case the goods or cattle distrained shall amount unto that value; and in case they shall not amount to that value, then so much as the value of the goods or cattle distrained shall amount unto, with his full costs of suit; and shall have execution for the same by *fieri facias*, *elegit*, or otherwise." And by the same statute, the like proceeding may be had, where judgment is given for the avowant, or for him that maketh cognisance for any kind of rent. And it is thereby further enacted, that "in case the plaintiff shall be nonsuit after cognisance or avowry made, and issue joined, or if the verdict shall be given against the plaintiff, then the jurors that are empannelled to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum in arrear, and the value of the goods or cattle distrained. And thereupon the avowant, or he that maketh cognisance, shall have the like judgment," &c., as before.(a)

(a) In the cases of *Valentine v. Faucet*, 2 Stra. 1021; and in *Ca. temp. Hardw.* 138. *Ld. Hardwicke* laid it down that in every case, unless where the court is tied up by this statute, a writ of inquiry may be granted in order to do complete justice. *See Hopewell v. Price*, 2 Harr. & Gill. 275.g

If the plaintiff be nonsuited, the defendant is not bound to proceed by writ of inquiry under the above statute of 17 Car. 2, c. 7, but may, if he pleases, bring his action against the plaintiff and his sureties on the replevin-bond.

Waterman v. Yea, 2 Wils. 41. || *Vide* 1 Taunt. 218. and *semble* the defendant may also bring his action on the bond after proceeding by writ of inquiry, under the stat. 17 Car. 2. *Vide* 2 Bro. & B. 107; *Perreau v. Bevan*, 5 Barn. & C. 284.||

If he does proceed under the statute by suing out a writ of inquiry, and also a *retorno habendo*, a writ of second deliverance will be a *supersedeas* to the latter, but not to the former; so that the plaintiff shall have his cattle, and the defendant his arrears, costs, and damages, by virtue of the proceedings under the statute.

Cooper v. Sherbrooke, 2 Wils. 116.

For the damages are not for the things avowed for, but are given by stat. 21 H. 8, c. 19, as a compensation for the expense and trouble the avowant has undergone; and therefore, though the writ of second de-

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liverance supersedes the effect of the defendant's judgment or nonsuit, viz., a return of the goods, yet the damages still continue. *Sed quære*, if under the writ of inquiry, the defendant shall not recover all the rent avowed for, besides his costs and damages?—For *per* Bathurst, J., By this statute the legislature intended that the proceedings by writ of inquiry, *fieri facias*, and *elegit*, should be final, for the avowant to recover his damages, and that the plaintiff should keep his cattle, notwithstanding the course of awarding a *retorno habendo*, which is the right judgment; for the statute hath not altered the judgment at common law, but has only given a farther remedy to the avowant.

1 Salk. 95; Carth. 253; Espin. 377; 2 Wils. 117. || But this doctrine is now overruled, and it is settled that the defendant, by electing to proceed under the stat. 17 Car. 2, c. 7, is not confined to his execution under that statute, but may proceed against the sureties on the replevin-bond, assigning as a breach, the not prosecuting *with effect*, (which means not prosecuting with *success*,) and the not making a return; and if the sheriff have lost the replevin-bond, he may be sued for his negligence. *Perreau v. Bevan*, 5 Barn. & C. 284, and *Turnor v. Turner*, 2 Brod. & Bing. 107. ||

Where a defendant avowed for a year's rent, and had a verdict, but no value being found by the jury, a motion was made to the court for a rule to show cause why a writ of inquiry should not issue under 17 Car. 2, c. 7, to ascertain the amount of the rent in arrear, and the value of the cattle distrained. Gould, J., doubted whether it could be granted to supply a defective verdict in case of rent, though he held that after judgment by default, it certainly would lie; and added, that Burrow's note of the case of *Andrews v. James*, M. 24 G. 2, B. R., which was cited in favour of the rule, stated that to be a judgment by default. However, no cause being shown, the rule was made absolute.

Freeman v. Lady Archer, 2 Bl. 763. *Tidd's Pract.* 622, (8th ed.) || *β* Under the practice of Pennsylvania, and the statute 17, ch. 2, c. 7, the jury must find the amount of rent due, if any. *Howard v. Johnson*, 1 Ashm. 58. See *Albright v. Pickle*, 4 Yeates, 264; *Smith v. Aurand*, 10 Serg. & R. 92. *g*

The defendant had judgment upon demurrer for a return irreplevisable, as at common law, upon which a writ of inquiry was awarded pursuant to the statute. And on error brought, it was objected, that when the defendant proceeds on the statute, he ought not to have judgment for a return; but the court held that the judgment was well given, for the reasons before mentioned.

Carth. 253.

But, where the defendant pleaded *non cepit*, and after obtaining judgment of *retorno habendo*, procured a writ of inquiry of damages to be executed,—the court set aside the writ of inquiry, and the inquisition taken thereon, because there had been no avowry; for the avowry, which is in the nature of a declaration, is the only ground of an inquiry for the defendant in replevin.

Ca. of Prac. in C. P. 42.

Where the jury who try the issue omit to inquire of the rent in arrear, pursuant to the statute, no writ of inquiry can be AFTERWARDS awarded to supply the omission; and therefore, in such case, the defendant must pursue the common law judgment of *retorno habendo*. But, where the defendant avows, as overseer, for a poor's rate, under the 43 Eliz. c. 2, and the plaintiff is nonsuit, or a verdict passes against him, and the jury are discharged without inquiring of the treble damages, given by that statute to

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the defendant, the defect may be cured by a writ of inquiry; because such inquiry is no more than an inquest of office.

1 Lev. 255; Carth. 362; 3 Wils. 442. [See 6 Maul. & S. 128.]

If the jury find a verdict for the defendant with damages, without finding either the amount of the rent in arrear, or the value of the distress, the defendant may take a judgment *pro retorno habendo*; or he may amend the judgment for the damages, even after the record is removed into a court of error, by substituting a judgment for a *retorno habendo*: and if he neglects making such amendment, a court of error, though it reverse the judgment for the damages, will award a judgment for a *retorno habendo*, and give the defendant costs up to the time of the judgment in the court below.

Rees v. Morgan in error, 3 Term Rep. 349. [In *Hefford v. Alger*, 1 Taunt. 218, it was decided that defendant is not bound to proceed at all under 17 Car. 2. c. 7; nor, if he elect to proceed at common law, is he bound to sue out a *retorno habendo* as soon as possible, for the benefit of the sureties in the replevin-bond.] § On an avowry for rent, if there be a general verdict for the defendant for a certain sum, but no finding of the value of the goods distrained, the judgment at common law is *de retorno habendo*. *Williams v. Smith*, 10 Serg. & R. 202; *Weidel v. Roseberry*, 13 Serg. & R. 178. When the goods are delivered to the plaintiff, and the verdict is for the defendant, the judgment is *pro retorno habendo*, and damages for the taking. *Easton v. Worthington*, 5 Serg. & R. 132. See *Huston v. Wilson*, 3 Watts, 287; *Gibbs v. Bartlett*, 2 Watts & Serg. 29; *Kimmel v. Kint*, 2 Watts, 431.

Where the plaintiff in replevin was removed by the defendant into the court of C. B. from an inferior court by a *recordari facias loquelam*, which was filed on the appearance day of the return, and a rule to declare was given, the court held, that the defendant might sign a judgment of *non proa*. for want of a declaration, without demanding a declaration, as in other actions.

James v. Moody, 1 H. Bl. 282.]

§ Judgment as in case of nonsuit is never granted in replevin.

Berrett v. Forrester, 1 Johns. Cas. 247; *Poltz v. Curtis*, 9 Wend. 497.

When judgment is rendered against a plaintiff in replevin, and there is no other plea than *non cepit*, the defendant is not entitled to judgment *pro retorno habendo*.

The People v. Niagara, C. P., 4 Wend. 217.

In replevin on a plea of *non cepit* and property in a stranger, where the jury find a verdict for plaintiff, an entry upon the record of a finding for the plaintiff upon both issues is warranted by the verdict.

Rhodes v. Bunts, 21 Wend. 19.

When the defendant pleads property and *non cepit*, a verdict for the plaintiff upon the latter plea determines nothing between the parties but the taking, and the plaintiff is not entitled to recover unless the other issue be found for him.

Bemis v. Beekman, 3 Wend. 667. See *Boynton v. Page*, 13 Wend. 425; *Sprague v. Kneeland*, 12 Wend. 161.

If the plaintiff fail to establish an exclusive right to possess and control the property, the defendant is entitled to a verdict.

Rogers v. Arnold, 12 Wend. 30.

When the plaintiff in replevin enters a *noile prosequi* as to one defendant, who has made cognisance claiming a right to the possession of

RESCUE.

(A) Rescue, what it is, and of what Things it may be.

the property, there shall be judgment for a return of the property, unless it appear by the record he is not entitled to it.

Kerley v. Hume, 3 Monr. 182.

In replevin the jury may give such damages as they think equivalent to the injury.

Dorsey v. Gassaway, 2 Harr. & Johns. 412.

Where, upon a variance in the terms of the tenancy proved and that alleged, the judge refused to amend, but directed the jury to find the fact specially; held, that the court had no power to give judgment according to the very right, if the party may have been prejudiced by the misstatement, nor could the court interfere to expunge the special endorsement.

Knight v. M'Dowall, 4 Perr. & D. 168.

In replevin, the defendant avowed for rent in arrear from one J M, and also claimed the goods as property of himself and another as assignees of J M, against whom a commission of bankruptcy had issued. A verdict having been taken on the whole record, the court ordered it to be entered on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees.

Emery v. Mucklow, 4 M. & Scott, 263.

On an avowry or justification of a taking as a distress for the whole rent, a jury may find a verdict for the sum due upon an apportionment.

Neale v. Mackenzie, 1 Gale, 119.g

|| As to setting aside and staying proceedings in Replevin, vide Tidd's Pract. (8th ed.), and vide tit. "COSTS," *antè*, vol. ii.||

RESCUE.

(A) What it is, and of what Things it may be.

(B) In what Cases a Rescue may be justified.

(C) Of the Offence of making a Rescue, and how the Offenders are to be proceeded against.

(D) The Form of the Proceedings on a Rescous.

(E) Of the Return of a Rescous: And herein,

1. *In what Cases the Sheriff may return a Rescous; and therein, of the Difference between a Rescous on Mesne Process and Execution.*
2. *Of the Form of the Return, and for what Defects it may be quashed.*
3. *Whether the Sheriff's Return of a Rescue be traversable.*

(A) Rescue, what it is, and of what Things it may be.

RESCUE is the taking away and setting at liberty against law a distress taken for rent, or services, or damage-feasant. But the more general notion

(B) In what Cases a Rescue may be justified.

of a rescous is, the forcibly freeing another from an arrest or some legal commitment, which, being a high offence, subjects the offender not only to an action at the suit of the party injured, but likewise to fine and imprisonment at the suit of the king.

Co. Lit. 160 ; F. N. B. 236.

If a man distrain cattle, and as he is driving them to the pound they go into the owner's house, and he refuse to deliver them, this is a rescue in law.

Co. Lit. 161.

But here we must observe, that there can be no rescous but where the party has had the (a) actual possession of the cattle or other things whereof the rescous is supposed to be made; for if a man come to arrest another, or to distrain, and be disturbed, (b) regularly, his remedy is by action on the case.

Co. Lit. 161 a ; Lit. Rep. 296 ; Hetl. 145. (a) A rescue was returned *quod arrestavit*, and quashed, because not said *et in custodia habuit*. Sid. 332. (b) That it is a contempt of the court, and punishable as a misdemeanor. 6 Mod. 210.

If upon a *feri facias* the sheriff seizes goods which are taken away by a stranger, this is not properly a rescue; for by the seizure of the goods, by virtue of the *feri facias*, the sheriff has a property in them, and (c) may maintain trespass or trover for them: also, the party injured may have an action on the case against the wrongdoer.

Hetl. 145 ; Lit. Rep. 296, Sheriff of Surry v. Alderton. (c) For this vide Cro. Eliz. 639 ; 2 Saund. 411 ; Vent. 52.

If upon a *feri facias* the sheriff return that he had seized the goods, but that they were rescued by B and C, &c., this is not a good return, but he shall be amerced: the party also, at whose suit the execution issued, may charge him by *scire facias* for the value of the goods. (d)

Vent. 21 ; 2 Saund. 343 ; Show. 180. (d) This is not like mesne process, because in cases of executions the sheriff may take the *posse comitatus*.

(B) In what Cases a Rescue may be justified.

If the lord distrain for rent when none is due, the tenant may lawfully make rescue: so may a stranger, if his beasts be distrained when no rent is due. So, if the tenant tender the rent when the lord comes to distrain, and yet he do distrain, or if he distrain any thing not distrainable, as beasts of the plough, when other sufficient distress may be taken, the tenant may make rescous; so may he, if the lord distrain in the highway or out of his fee.

Co. Lit. 47, 160 b, 161 a.

But, though there must be reason for the distress, and that otherwise the rescue cannot be unlawful; yet, it hath been held in a *parco fracto*, that the defendant cannot justify breaking the pound and taking out the cattle, though the distress was without cause, because they are now in the actual custody of the law.

Salk. 247, pl. 2 ; Ld. Raym. 104, Cotsworth v. Bettison.

There is a difference between a man's being arrested by a warrant on record, and by a general authority in law; for, if a *capias* be awarded to the sheriff to arrest a man for felony, though he be innocent, he cannot make rescue. But if a sheriff will, by the general authority committed

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to him by law, arrest any man for felony, if he be innocent, he may rescue himself.(a)

Co. Lit. 161. Vide 5 Co. 68, Mackally's case; 6 Co. 54; Cro. Ja. 486. (a) But, such arrest *virtute officii* being made on a just ground of suspicion of felony, the party rescues himself at his peril; for, according to Lord Hale, if in the attempt to make the rescue he is upon necessity slain, it is no felony in the officer; and, upon the same principle, if the officer is killed, it will be murder. 2 H. H. P. C. 85, 86, 87, 92, 93. The obvious reason is, that the law makes it a duty in the sheriff and certain other officers to arrest for felony, on just suspicion, and therefore rescue from such an arrest is resistance of lawful authority. If this be so, Lord Coke is here too unqualified in his expression: Co. Lit. 162 a, n. 3, 13th edit.: and it hath been lately adjudged, that where a person is directly charged with a felony, peace-officers are justified in arresting him without any warrant, though it should afterwards turn out that no felony hath been committed. Samuel v. Payne, Dougl. 359.

|| And the owner of goods, improperly taken under an execution, may retake them, if he can do so without a breach of the peace. By a contract of sale, the property sold was to be paid for by ready money; the vendee induced the servant of the vendor to deliver it for a check upon a banker, by representing it to be as good as money: in fact, he had overdrawn his account for many months, and when the check was presented, payment was refused. On the same day that the goods were purchased, the vendee gave a warrant of attorney to a creditor, under which judgment was immediately entered up, and execution issued; and the property in question seized by the bailiff of a liberty: while it was in his custody the original owner rescued it; held, in an action by the bailiff against the latter for a rescue, that the question, whether the contract of sale was so vitiated by fraud as to prevent the property in the goods passing to the vendee, depended on a question of fact, which ought to have been submitted to the jury, viz.: whether the vendee had obtained possession of the goods with a preconceived design not to pay for them.

Earl of Bristol v. Wilsmore, 1 Barn. & C. 514.||

(C) The Offence of making a Rescue, and how the Offenders are to be proceeded against.

It seems agreed, that the rescuing of a person imprisoned for felony is also felony by the common law.

Hal. Hist. P. C. 606.

Also it is agreed, that a stranger who rescues a person committed for, and guilty of high treason, (b) knowing him to be so committed, is in all cases guilty of high treason.

Stamf. P. C. 11; Jon. 455. (b) Whether he knew that the prisoners were so committed or not. Cro. Car. 583.

To make a rescue felony, the following rules are laid down by Lord Chief Justice Hale: 1st, That it is necessary that the felon be in custody or under arrest for felony; and therefore if A hinder an arrest, whereby the felon escapes, the township shall be amerced for the escape, and A shall be fined for the hinderance of his taking. But it is not felony in A, because the felon was not taken.

Hal. Hist. P. C. 606; 3 E. 3, Coron. 333; Stamf. 31.

So, to make a rescue felony, the party rescued must be under custody for felony or suspicion of felony. And it is all one whether he be in custody for that account by a private person or by an officer or warrant of a justice; for, where the arrest of a felon is lawful, the rescue of him is felony. But it seems necessary that he should have knowledge that the

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person is under arrest for felony, if he be in the custody of a private person.

Hal. Hist. P. C. 606.

But, if he be in custody of an officer, as constable or sheriff, there, at his peril, he is to take notice of it; and so it is if there be felons in a prison, and A, not knowing of it, break the prison and let out the prisoners, though he knew not that there were felons there, it is felony.

Hal. Hist. P. C. 606; Cro. Car. 583.

A person committed for high treason, who breaks the prison and escapes, is guilty of felony only, unless he lets others also escape whom he knows to be committed for high treason; in which case he is guilty of high treason, not in respect of his own breaking of prison, but of the rescous of the others.

2 Hawk. P. C. c. 21, § 7, c. 18, § 17.

If the person rescued were indicted or attainted of several felonies, yet the escape or rescue of such person makes but one felony.

Hal. Hist. P. C. 599.

Wherever the imprisonment is so far groundless or irregular, or the breaking of the prison is occasioned by such a necessity, &c., that the party himself breaking prison is either by the common law, or by the statute *de frangentibus prisonam*, saved from the penalty of a capital offence, a stranger who rescues him from such an imprisonment is in like manner also excused; *et sic è converso*.

2 Hawk. P. C. c. 21, § 2.

A return of a rescue of a felon by the sheriff against A is not sufficient to put him to answer for it as a felony, without indictment or presentment, by the statute 25 E. 3, c. 4.

Hal. Hist. P. C. 606.

As in case of an escape, so in case of a rescue, if the party rescued be imprisoned for felony and be rescued before indictment, the indictment must surmise a felony done, as well as an imprisonment for felony or suspicion thereof. But, if the party be indicted, and taken by a *capias*, and rescued, then, there needs only a recital that he was indicted *prout* and taken and rescued.

Hal. Hist. P. C. 607.

But though the rescuer may be indicted before the principal be convicted and attainted, yet he shall not be arraigned or tried before the principal be attaint. But, (a) if the person rescued were imprisoned for high treason, the rescuer may immediately be arraigned, for that in high treason all are principals. Also, it seems, that he may be immediately proceeded against for a misprison only, if the king please.

Hal. Hist. P. C. 607. (a) 2 Hawk. P. C. c. 2, § 8.

The rescuer of a prisoner for felony, though not within clergy, yet shall have his clergy.

Hal. Hist. P. C. 607. As those who break prison are punishable, as for a high misprison, by fine and imprisonment in those cases, wherein they are saved from judgment of death by the statute *de frangentibus prisonam*; so also are those who rescue such prisoners in the like cases in the same manner punishable. 2 Hawk. P. C. c. 21, § 6.

||Accordingly, in a late case it was held, that rescuing a person under commitment for burglary was not a transportable offence, but punishable only as a felony within clergy at common law.

Rex v. Stanly, Russ. & Ry. Ca. 432.||

By the 6 G. 1, c. 23, § 5, it is enacted, that if any person shall rescue

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felons ordered for transportation, or assist them in making their escape, he shall be guilty of felony, and suffer death without benefit of clergy.

See also 9 G. 1, c. 28, by which the rescuing persons arrested in the mint, &c., is made felony.*—* Rescuing the body of offender executed for murder from the sheriff or surgeons, felony within clergy, by 25 Geo. 2, c. 31, § 10.—But it is felony without clergy to rescue any person committed for or found guilty of murder, or going to execution, or during execution.—Ibid. § 9.—So as to persons transported for rescuing the body, returning. Ibid. § 10.—So, rescuing offenders under the act called the Black Act, see 9 Geo. 1, c. 22, is felony without benefit of clergy. || But by 4 Geo. 4, c. 54, § 1, the capital punishment is repealed, and transportation for seven years, or imprisonment not exceeding three years, with hard labour, is substituted.—As to the offence of aiding the escape of persons sentenced to death by court-martial, see Mutiny Act, 6 Geo. 4, c. 5, § 13; and as to marine forces, see 6 Geo. 4, c. 6, § 14; and as to aiding the escape of prisoners of war, see 52 Geo. 3, c. 156; *Rex v. Martin*, Russ. & Ry. 196; and see Russ. on Cri., book 2, c. 34, (2d ed.)||

||By the statute 1 & 2 G. 4, c. 88, it is enacted, that if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned any term not exceeding one year, it shall be lawful for the court, by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour in the common jail, house of correction, or penitentiary house, for any term not less than one, and not exceeding three years.

The statute 4 Geo. 4, c. 64, § 43, intituled “An act for the consolidating and amending the laws relating to the building, repairing, and regulating of certain jails and houses of correction in England and Wales,” enacts, that if any person shall convey, or cause to be conveyed, into any prison to which the act shall extend, any mask, visor, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver, or cause to be delivered, to any prisoner in any such prison, or to any other person there for the use of any such prisoner, without the consent or privity of the keeper of such prison, every such person shall be deemed to have delivered such visor or disguise, instrument or arms, with intent to aid and assist such prisoner to escape, or attempt to escape; and if any person shall by any means whatever aid and assist any prisoner to escape, or in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony, and being convicted thereof, shall be transported beyond the seas for any term not exceeding fourteen years.

The same statute, (§ 44,) to the intent that prosecutions for escapes, breaches of prison, and rescues may be carried on with as little trouble and expense as possible, enacts, “That any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and re-taken.” And it also enacts, that a certificate of the clerk of assize, or other clerk of the court in which the offender was convicted, together with due proof of the identity of the person, shall be sufficient evidence of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced.

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The late statute 5 G. 4, c. 84, which was passed for the purpose of revising and consolidating the laws for regulating the transportation of offenders from Great Britain, provides, that if any person shall rescue, or assist in rescuing or attempting to rescue, any offender sentenced or ordered to be transported or banished, from the custody of the superintendent or overseer, or of any sheriff or jailer, or other person conveying, removing, &c., such offender, or shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a jail or prison in the custody of the sheriff or jailer for the crime of which such offender shall have been convicted.||

As the offence of rescuing persons in cases of treason and felony is usually punished by indictment, so the offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to a(a) writ of rescous or a general action of trespass *vi et armis*, or (b) an action on the case, in all which damages are recoverable. Also, it is the frequent practice of the courts to grant an(c) attachment against such wrongdoers, it being the highest violence and contempt that can be offered to the process of the court.

Co. Lit. 161; Co. Ent. 614; Rast. Ent. 577. (a) For this vide F. N. B. 226.—A writ of rescous against the father and son, the father for rescuing the son, and the son for rescuing himself. 2 Bulst. 137.—In rescous the writ is conceived on the special matter. 9 Co. 12 b. (b) On a motion for an information against one for rescuing a person from the sheriff in the Temple, the court advised them to get the rescous returned, and to bring an action on the case against him as the better way. Cases in B. R. 556. (c) A rescuer shall be doubly punished, for upon the return of the sheriff he shall be fined to the king, and an attachment shall issue out against him. 3 Bulst. 201. [There must be a return. 1 Stra. 531.]—On all returns of a rescous, process of outlawry lies. 13 H. 7, 21, pl. 5; 2 Inst. 665; cont. Fitz. Process, 56, 213; 29 E. 3, 18.

He who rescues a prisoner from any of the courts of Westminster-hall without striking a blow, shall forfeit his goods and the profits of his lands, and suffer imprisonment during life; but not lose his hand, because he did not strike.

22 E. 3, 13; 3 Inst. 141.

It is clearly agreed, that for a rescous on mesne process, the party injured may have either an action of trespass *vi et armis* or an action on the case, in which he shall recover his debt and damages against the wrongdoer; and the rather, because on (d) mesne process he can have no remedy against the sheriff.

Cro. Ja. 486; Hob. 180. (d) Vide *post*.

Also it hath been adjudged, that for the rescous of a person in execution on a *capias ad satisfaciendum* or *capias utlagatum*, an action will lie against the rescuer, though the party injured hath his remedy against the sheriff, and the sheriff hath his remedy over against the wrongdoer; for perhaps the sheriff may be dead or insolvent. But herein it hath been held, that if he bring his action against the party who made the rescue, he may plead it in bar to an action brought by the sheriff: so, if against the sheriff or his bailiff, they may plead that he had satisfaction from the party, so that if he recovers against one, the other is discharged.

Hutt. 98; Hob. 180.

By the statute 2 W. & M. stat. 1, cap. 5, § 5, it is enacted, "That upon Vol. VIII.—74

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pound-breach, or rescous of goods distrained for rent, the person grieved shall, in a special action on the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use."

||See Bradby on Distresses, chap. 14, (2d ed.)||

In an action upon the case for a rescous, upon this statute it hath been held, that the plaintiff shall recover (a) treble costs as well as treble damages, for the damages are not given by the statute but increased; an action on the case lying for a rescous at common law.

Salk. 205, pl. 2; Ld. Raym. 19; Skin. 555, pl. 4; Carth. 321; Lawson v. Storie. [(a) But, to entitle him to recover, he must show that he has complied with the directions of the statute, and conclude *contra formam statuti*. Anon. 1 Ld. Raym. 342.] ||Tender of amends after impounding is no plea to an action on the statute. Firth v. Purvis, 5 Term. R. 432.||

An attachment will be granted not only against a common person, but even against a peer of the realm, for rescuing a person arrested by due course of law; so that if the sheriff shall in any case return to the court, that the person arrested, or goods seized, or possession of lands delivered by him, by virtue of the king's writ, were rescued or violently taken from him, &c., they will award an attachment against the rescuers.

Dyer, 212; 2 Jon. 39.

But herein it seems to be the practice of late, not to grant an attachment in any case for a rescous, unless the officer will (b) return it, for that it hath been found by experience, that officers will often take upon them to swear a rescous where they will not venture to return one.

2 Hawk. P. C. c. 22, § 34. (b) A distinction between a rescous on mesne process and upon a writ of execution; in which last it was said by Holt, C. J., the sheriff could not return a rescous, and therefore the court can have no other ground for an attachment but affidavits, and ought to be contented therewith; but, on mesne process, a rescous may be returned, which being matter of record, and, by consequence, a better motive, ought to be given to the court. 6 Mod. 141.

In a late case, a distinction was taken where an attachment is prayed for a rescous in the first instance, and where a rule to show cause is only asked; in this, affidavits of the fact are sufficient; in the other case, the sheriff's return is requisite.

Trin. 5 G. 2, in B. R., Young v. Payne.

Where, upon the return of a rescue, an attachment is granted, and the party examined upon interrogatories, upon answering them, he shall be discharged. But, if the rescous is returned to the filazer, and process of outlawry issues, and the rescuer is brought into court, he shall not be discharged upon affidavits.

2 Salk. 586, pl. 1, Rex v. Belt.—Said by Sir Sam. Astry to be the constant course, upon the return of a rescue, to set four nobles fine upon each offender. 2 Salk. 586, pl. 3; 2 Jon. 198, *accord*. [This is not so; the fine is discretionary. Rex v. Elkins, 2129.—The attachment must be returnable at a general return. Rex v. Wilkins, Stra. 624.—The rescuers, on submitting to a fine, may be permitted to read affidavits to show there was not any real arrest. Rex v. Minify, Stra. 642.—The sheriff's return of a rescue is of itself a conviction of a rescue, and process immediately issues from the crown-office against the rescuer. Rex v. Pember, Ca. temp. Hardw. 112.—Return of rescous is not traversable, and the rescuer must be brought into court to be fined, Barnes, 429; and not being traversable, the offender shall be punished without being examined upon interrogatories. 4 Burr. 2120. ||Sed vide 5 Term R. 362.||—The rescuer may be admitted to give recognisance, to try false return against the sheriff. Barnes, 430.—If there is a verdict for the plaintiff the recognisance shall be discharged. Ibid.]

(D) The Form of the Proceedings on a Rescous.

[By stat. 8 & 9 W. 3, c. 27, § 15, the rescuer of any person arrested upon civil process within the pretended privileged places therein mentioned, || viz. Whitefriars, Savoy, Salisbury Court, Ram Alley, Mitre Court, Fuller's Rents, Baldwin's Gardens, Mountagu Close, Minories, Mint, Chink, Deadman's Place,|| and any person aiding, abetting, or assisting the same, shall, being lawfully convicted thereof, forfeit to the plaintiff in the action 500*l.*, to be recovered by action of debt, &c.; and if after such recovery he shall neglect to pay the money recovered, with full costs of suit, within one month after judgment signed thereupon, and demand made, he shall, upon producing a copy of the judgment, and oath made that the money recovered is not paid, by order of the court wherein he was convicted of the rescue, be transported for seven years. And any person convicted of receiving or concealing such rescuer shall be likewise transported for seven years, unless within one month after this conviction he shall pay to the plaintiff in the action the full debt or duty for which the action was brought, with full costs.]

(D) The Form of the Proceedings on a Rescous.

AN indictment of a rescous ought to set forth the special circumstances of the fact with such certainty, as to enable the defendant to make a proper defence.

Dyer, 164.—That no defect can be aided by the verdict. Roll. Abr. 781.

And therefore, if an indictment lay the offence on an uncertain or impossible day, as, where it lays it on a future day, or lays one and the same offence at different days, or lays it on such a day as makes the indictment repugnant to itself, it is void.

Moor, 555; Rast. Ent. 263.

When an indictment of rescous set forth that J S committed such a felony, such a day and year, and place, *per quod A B prædictum J S cepit et arrestavit, et in salva custodia sua ad tunc et ibidem eundem, J S habuit et custodivit*, it is made a *quære* whether the indictment be not insufficient, because no time of the arrest is alleged in the same sentence with it; and it is doubtful whether the time of the custody, which is alleged in the next sentence by force of the copulative, be applied also to the arrest or not; and Dyer seems rather to incline to the contrary opinion.

Dyer, 164, pl. 60.

Also it is held in Dyer, that an indictment of a rescous is not good without expressly showing the day and year both of the arrest and also of the rescous, and that the time of the latter is not sufficiently shown by showing that of the former.

Dyer, 164.

But it hath been since adjudged, upon exceptions taken to an indictment for a rescous, that it was not necessary to allege the place where the rescue was made, and that it should be intended that where the arrest was, there also was the rescue without the word *ibidem*.

Cro. Ja. 345; 2 Bulst. 208, S. C., Cramlington's case.

An exception taken to an indictment of rescous, that it wanted the words *vi et armis*, or *manu forti*, but overruled, it being held by the court that the word *recussit* implies it to be done by force.

Cro. Ja. 345.—The same exception taken in Cro. Ja. 473, overruled and there held, that though it were error at common law, yet it is made good by the statute 37 H. 8, c. 8.

[(D) The Form of the Proceedings on a Rescous.

An exception taken to an indictment of a rescous from a serjeant at mace, who had taken a man on a plaint in London, because it did not set forth that the person was taken by virtue of any warrant; but it being alleged that he was lawfully arrested, it shall be intended by a good warrant.

Cro. Ca. 472, Hart's case.

||Where the indictment stated that the judges of the court of record of the town and county of Poole issued their writ directed to J B, one of the serjeants at mace of the said town and county, to arrest W, by virtue of which J B was proceeding to arrest W, but that the defendant assaulted J B, and prevented the arrest; the indictment was held bad, it not appearing that J B was an *officer of the court*; and there could not be judgment on such count, after a general verdict, for the assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment were for the cause therein stated.

The King v. Osmer, 5 East, 304.||

It is said that an indictment of rescous is not within the statute of additions, and that the naming the person indicted of such a parish, without giving him any title, is sufficient.

2 Inst. 655; 2 Show. 84, pl. 72.

[In an indictment for a rescue from the house of correction, it must appear for what the prisoner was committed there, so as to make the house of correction a proper prison, which *prima facie* it is not for all offences. Besides, on so general a charge, the court cannot judge of a proper punishment.

Rex v. Freeman, 2 Str. 1226.]

Note: upon an indictment of rescous, if it were upon an arrest upon mesne process, and the party has appeared, the court will be easily induced to quash it: so if it be on process out of an inferior court, though the party has not appeared; for no aid is given to inferior jurisdictions.

In an action for a rescue the plaintiff must allege in his declaration all the material circumstances; as that such a writ issued, that he was arrested in custody, and that he was rescued, &c.

Godb. 125; Lutw. 130.

In an action on the case for a rescous on mesne process, the evidence was, the bailiff stood at the street-door, and sent his follower up three pair of stairs in disguise with the warrant, who laid hands on the party, and told him that he arrested him; but he with the help of some women got from the follower and ran down stairs, and the defendant hearing a noise ran up and put the party into a room, locked the door, and would not suffer the bailiff to enter. Holt, C. J., doubted whether this was a lawful arrest, being by the bailiff's servant, and not in his presence (a); but said, that the plaintiff must prove this cause of action against the party; that he must prove the writ and warrant by producing sworn copies of them; he must prove the manner of the arrest, that it may appear to the court to be legal, and in point of damage he must prove the loss of his debt, (b) viz., that the party became insolvent, and could not be retaken.

6 Mod. 211, Wilson v. Gary. [(a) The arrest must be made by the authority of the bailiff, but he need not be the hand that arrests, nor in the presence, nor actually in sight, nor within any precise distance, of the person arrested. Blatch v. Archer, Cowp. 65. (b) This, though *expedient*, is not *necessary*. Espin. 657.]

(E) Of the Return of a Rescous: And herein,

1. In what Cases the Sheriff may return a Rescous; and therein, of the Difference between a Rescous on Mesne Process and Execution.

THE distinction herein laid down in a variety of books and cases is, that on a rescue on mesne process the sheriff may return the rescue, and is subject to no action; for that on a mesne process he was not (a) obliged to raise his *posse comitatus*, nor would it be convenient so to do on the execution of every mesne process.

Cro. Eliz. 868; March, 1; Jon. 201; 3 Bulst. 198; Roll. Rep. 389; Noy, 40; Moor, 852; 2 Lev. 144; 6 Mod. 141; Lutw. 130, 131. (a) But the sheriff may, if he pleases, take his *posse* to arrest one on mesne process. Noy, 40.

But if the sheriff takes a man upon an execution, as upon (b) a *capias ad satisfaciend.*, and he is rescued from him, before he can bring him to prison, though he returns the rescue, yet this shall not (c) excuse him; for when judgment is passed, and he and his bail do not surrender him, nor pay the condemnation-money, and then a *capias* issues, to which there can be no bail, there it is presumed that he will not be forthcoming, because neither he nor his bail have satisfied the judgment, and therefore the sheriff ought to take the *posse comitatus*; and consequently it cannot be a good return, that he took the body, but that it was rescued. The party therefore may have an action of escape against the sheriff on his return. And this is provided by the statute Westm. 2, (13 Ed. 1, st. 1.) c. 39, which was made to prevent sheriffs from returning rescues to the king's writ.

Cro. Ja. 419; Roll. Rep. 388, 440; 3 Bulst. 198; Moor, 852, S. C., Probey v. Lumley. (b) Or upon a *capias utlagatum* after judgment. Cro. Ja. 419; Roll. Rep. 389. (c) So in a case of a *fieri facias*. Barnes, 430.

In an action on the case against the sheriff for an escape upon mesne process, the defendant pleaded a rescue, which on demurrer was held a good plea, though he did not show that the rescue was returned.

3 Lev. 46, Lord Gorges v. Gore, adjudged.

But, if one taken on mesne process be once in prison, the sheriff cannot return a rescous, for the law presumes that he hath (d) power to keep him there.

Roll. Rep. 441; 3 Bulst. 198; Cro. Ja. 419. (d) But if the prison is broken by the king's enemies, this shall excuse the sheriff; 4 Co. 84; Vent. 239;—but not if broken by rebels and traitors, for the sheriff or jailer hath his remedy over against them. 4 Co. 84; Cro. Eliz. 815; 2 Mod. 28; Vent. 239.

|| And if he escape through negligence in the officer, this will not justify the return of a rescue.

1 Holt, N. P. Ca. 537.||

If a felon be attaint, and in carrying him to execution he be rescued from the sheriff, the sheriff is punishable notwithstanding the rescue; for there is judgment given, and the sheriff should have taken sufficient power with him; and therefore in that case the township is not finable.

Hal. Hist. P. C. 602, and there said that a rescue is no excuse in felony.

2. Of the Form of the Return, and for what Defects it may be quashed.

It hath been adjudged, that the return of a rescue by a sheriff must show the year and day on which it was made, such return being in lieu of an indictment.

3 H. 7, 11, pl. 3; Bro. Return de Brief, 97; Fitz. Coro. 45; Attach. 1.

But it hath been held, that the sheriff's return of a rescue on a *latitat*,

(E) Of the Return of a Rescous.

without mentioning the day of the caption, was sufficient, all the clerks in court affirming the precedents to have been so.

Palm. 532.

The sheriff's return of a rescue, without mentioning the place where it was made, was held naught, and the party discharged.

Moor, 422, pl. 585.

|| It seems, that a return that the defendant rescued himself is good without naming the rescuers, or stating them to be people of the county.

Rex v. Sheriff of Middlesex, 1 Barn. & A. 190.

If the return do not state the arrest to have taken place in the county, it is bad, for if it were elsewhere the rescue was lawful.

Rex v. Sheriff of Middlesex, 1 Barn. & A. 190.||

So, where upon a *latitat* awarded against J S, the sheriff returned a rescous on such a day, but did not mention any place where the rescous was made; it was adjudged a void return, because it doth not appear that either the arrest or rescous were within his jurisdiction. But, if it had appeared to have been done in the county, it should be intended within his bailiwick, though it was within a liberty in the same county; and even in such case, the rescous had been unlawful, because the arrest was good, nobody being prejudiced thereby but the lord of the liberty.

Yelv. 51, Wolfreston's case.

But, where the return of a rescous recited that a *latitat* was directed to him, &c., and that he made his warrant to his bailiffs, who arrested A, and that he was rescued by J S, this was held good, though it did not show the time or place where the rescue was made.

2 Roll. Rep. 255, Webb v. Withers.

Upon reading the sheriff's return of a rescous, these exceptions were taken to it. 1st, It is said *feci warrantum meum Thomæ Taylor*, and doth not say that Thomas Taylor was his bailiff.(a) 2d, He doth not say for what cause he made his warrant, and so it appears not whether it was lawful or not; and upon these exceptions it was quashed.

Stil. 155. ||(a) Vide 5 East, 304.||

Exception to a sheriff's return of a rescue, that it was not alleged that the party was in custody, it being only by implication that he was rescued out of the bailiff's custody; and for this it was quashed: so that it was not returned who rescued, or that the party rescued himself.

Sid. 332; Lev. 214.

The sheriff returned a rescous on a special bailiff, viz., that Cook and seven others made an assault on the bailiff, &c., and the party arrested *cepit et abduxit*, when it ought to have been *ceperunt et abduxerunt*; and the court held the return good as to Cook, but void as to the others; and he was admitted to make his fine by (b) attorney, which was 6s. 8d.

Lit. R. 2. (b) An indictment for a rescous returned against one into B. R. ought not to be quashed, although it be erroneous, except the party that is indicted for it do appear personally in court; for he cannot in such case appear by attorney, because the offence was criminal and personal, for which he must answer in person. 2 Lil. Reg. 468.

A rescue of a person arrested on mesne process was returned against divers particularly named, and the return was that they *rescusserunt*, without saying *et quilibet eorum rescussit*; and held well enough, it being in the affirmative.

Vent. 2; 2 Keb. 436.

(E) Of the Return of a Rescous.

Exception taken to return of a rescue, that it was *feci warrant.*, without saying *sub sigillo officii*, but overruled; for it cannot be a warrant unless it be under seal, and the saying *feci warrant. direct.* implies it was so.

2 Jon. 197.

The sheriff returned a rescous thus: 1st, *non est inventus in ball. mea*, and *executio residui istius brevis patet in schedula huic brevi annex.*, and that was of a taking and rescous; and the return of the rescous was quashed for the repugnancy; for *per cur.* after *non est inventus* all the rest is idle, and there remains no more for the sheriff to do. But note; upon the return of a rescous the sheriff always concludes, that after the rescous made the defendant *non est invent. in balliva*.

6 Mod. 220; Rex v. Weekes.

The return of a rescue was, that the party was in custody of three of the bailiffs, and that the defendants *insultum fecerunt* upon one, which the sheriff called *ballivos meos*; and for that reason it was quashed.

5 Mod. 218.

It hath been a great question, and much debated in variety of cases, whether, upon a rescue of a person out of the custody of the sheriff's bailiff, the sheriff is to return the rescue *secundum veritatem facti*, or *secundum veritatem in lege*, that is, that he was rescued out of the custody of the bailiff, being the truth in fact, or out of his own custody, being the truth in law; the bailiff's custody being in law the custody of the sheriff himself. It seems now agreed that a return either way is good. (a) And herein some books distinguish between a bailiff of a (b) liberty and a common bailiff, and say that the return of a rescue out of the custody of a bailiff of a liberty ought to be so expressed, because he is such a public officer of whom the court takes notice. Others distinguish (c) between an action on the case and an indictment for a rescous, for that in the first the plaintiff must declare as the truth is, viz., that he was rescued being in the custody of the bailiff; but that in an indictment it must be according to the operation it hath in law.

Palm. 532; 2 Jon. 197; Cro. Eliz. 780; Lev. 214; 2 Lev. 28; Raym. 161; 4 Mod. 293; 5 Mod. 217; Sid. 332; Stil. 417. [(a) A return made by a sheriff that the person arrested was rescued out of the custody of the bailiff, has been held to be bad: the return must be that the person was rescued out of his custody. Per Buller, J., 2 Term R. 156.] (b) 2 Roll. R. 263; Stil. 417; Lev. 214. (c) Cro. Ja. 242; Raym. 161; 5 Mod. 217.

But where the sheriff returned *virtute brevis mihi direct. feci warrant. A & B ballivis meis qui virtute inde ceperunt* the defendant, *et in custodia mea habuerunt quousque* such and such *recusserunt* him *ex custodia ballivorum meorum*; this return was on motion quashed. For *per Holt, C. J.*, when the bailiffs have arrested the party, he is in fact and in truth in their custody, but in law he is in the custody of the sheriff; an answer either way is good, viz., that he was rescued out of the bailiff's custody, or that he was rescued out of the sheriff's custody; but to say that he was in the custody of the sheriff, and yet rescued out of the custody of the bailiffs, is repugnant.*

Salk. 586, pl. 2. *If it appear on the return that the warrant was to two and the arrest by one only, yet the return is good, for it is no exception in what relates to public justice. Rex v. Roe, 1 Stra. 117.—If on a return of a rescous of two persons, it is only said they could not afterwards be found, (without saying *nec eorum aliquis*.) it is ill. Rex v. Tucker, 1 Stra. 225; Fort. 362, S. C.—That the bailiff arrested the defendant is good. *Ibid.*—That the defendant being in my custody, is sufficient. *Ibid.*

3. *Whether the Sheriff's Return of Rescue be traversable.*

It seems that anciently, when the sheriff returned a rescue, the party was admitted to plead to it as to an indictment; but the course of late has been not to admit any plea to it, but drive the party to his action against the sheriff, in case the return were false. Hence it is now settled, that the return of a rescue is not traversable; but yet it hath been held, that the submission to the fine doth not conclude the party grieved from bringing his action for the false return, if it were so.

Cro. Eliz. 781; Dyer, 212; 2 Jon. 39; Vent. 224; 2 Vent. 175; Comb. 295; Barnes, 429.

SCANDALUM MAGNATUM.

At the time of making the law on which this action is founded, the constitution of this kingdom was martial and given to arms; the very tenures were military, and so were the services; as knights-service, castle-guard, and escuage; so that all provocations by vilifying words were revenged by the sword, which often created factions in the commonwealth, and endangered even the government itself. For in these kind of quarrels the great men, or peers of the realm, usually engaged their vassals, tenants, and friends; so that laws were then made against wearing liveries or badges, and against riding armed.

2 Mod. 156.

The law on which this action is grounded is the 2 R. 2, stat. 1, c. 5, which enacts, "That of counterfeiters of false news, and horrible lies, of prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and other great officers of the realm, it is defended that none contrive or tell any false things of prelates, lords, and of others aforesaid, whereof discord or slander might rise within the realm; and he who doth the same shall incur and have the pain ordained thereof by the statute of Westminster the first (3 E. 4, c. 34,) which will, that he be taken and imprisoned till he have found him of whom the word was moved." And by stat. 12 R. 2, c. 11, it is further provided, that "should he not be able to find such person, he shall be punished by the advice of the council, notwithstanding the said statutes."

[These two statutes are said to have been procured by the Duke of Lancaster, who was extremely unpopular, and at the time of the insurrection among the villeins, had been singled out as a principal object of their fury. 3 Reeve's Hist. 211; 1 Parl. Hist. 360.] [The Duke of Lancaster was at the head of the Baron's party, and had, amongst other things, enraged the populace by procuring the repeal of a proclamation of Richard, protecting tenants in villenage from demands of excessive rents. Before these statutes, several ordinances were made for his protection; one *pro rege Castella*, (the title assumed by the duke,) *super fictiones et diffamationes insurgentium*; another, *pro rege Castella, de securitate contra insurgentes*. Rymer, vol. iii. part 3; Barr. on Stat. 301, 314.]

For the better understanding of this statute we shall consider,

- (A) The Persons who may bring this Action.
- (B) For what Words it lies.
- (C) The Proceedings in this Action.

(A) The Persons who may bring this Action.

It hath been held, that the king is not included in the words *great men of the realm*, as the statute begins with an enumeration of persons of an inferior rank, as prelates, dukes, &c.

Crompt. Jur. 19, 35.

Also it is held, that a woman noble by birth is not entitled to this action.

Crompt. Jur. 34.

It hath been adjudged, that though there was no viscount at the time of making this statute, (the first viscount being John Beaumont, who was created viscount 18 H. 6,) yet, when created noble, though by a new title, he was entitled to his action on this statute.

Cro. Car. 136; Palm. 565; Viscount Say and Sele v. Stephens, Ley, 82.

Also it hath been adjudged, that since the Union a peer of Scotland may have an action on this statute, and that it is not necessary for him to allege that he hath a seat and voice in parliament; for by the 5 Ann. 8, art. 23, all peers of Scotland after the Union shall be peers of Great Britain, and have rank and precedence, &c., be tried, &c., and enjoy all privilege of peers as fully as the peers of England now do or hereafter may enjoy, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and particularly the right of sitting upon the trial of peers.(a)

Com. Rep. 439, pl. 202, Lord Viscount Falkland v. Phipps. (a) A Baron of the Exchequer may have this action. Palm. 569; Semb. 12; Co. 134.—It does not lie for a peer, if he was not so at the time of speaking the words. Palm. 566.

(B) For what words it lies.

It hath been contended for, that no words of slander are punishable by this statute unless they are actionable at common law, and that they are only aggravated by the statute, which in this respect is like the king's proclamation.

2 Mod. 161; Sir Robert Atkins in his Argument, Freem. 222, pl. 229.

But the contrary hereof seems to have been holden in most of the cases on this head, and not without reason, as it would be to no purpose to make a law, and thereby to give a peer an action for such words as a common person might have before the making of the statute, and for which the peer himself had equally a remedy by the common law; and therefore the design of the statute must be, not only to punish such things as import a great scandal in themselves, or such for which an action lay at the common law, but also such things as savoured of any contempt of the persons of the peers or great men, and brought them into disgrace with the commons, whereby they took occasion of provocation and revenge.

2 Mod. 156.

It hath been observed, that no action had been brought on this statute till 100 years after the making thereof, the lords still continuing the military way of revenge to which they had been accustomed.

2 Mod. 156, Sir Fran. Pemberton's argument.—It is said by my Lord Coke, that, at common law, scandal of a peer might be punished by pillory and loss of ears, and that this offence is now aggravated by the statute. 5 Co. 125. *De libellis famosis*. 12 Co. 37; 9 Co. 59; 2 Mod. 162.—That it was usual to punish offenders of this kind in the Star-chamber. 2 Mod. 152.

The first case on this statute said to be reported is in Keilw., where the

(B) For what Words it lies.

Lord Beauchamp brought an action of *scan. mag.* against Sir Richard Crofts, for that the said Sir Richard had sued out a writ of forgery of false deeds against him; and it was held, that the taking out the writ being done in a legal way, and in a course of justice, the action did not lie.(a)

Keilw. 26, 27; 2 Mod. 164, cited. (a) The action does not lie for a judicial proceeding against a peer by action, appeal, indictment, &c., though he be acquitted. 2 Inst. 228; Hob. 266; R. Kel. 26, 27; Dyer, 285 a.

Scan. mag. was brought for these words, *You have no more conscience than a dog; so that you have goods, you care not how you come by them; and held actionable.*

Crompt. Jur. 13, Duke of Buckingham's case.—So in the same book, You said you would wind my guts about your neck, held actionable. Lord Abergeny's case, Crompt. Jur. 13.

So, for saying of a judge, *You are a corrupt judge.*

Crompt. Jur. 35, Lord Ch. Just. Dyer's case.

So, for these words, *J S is a covetous and malicious bishop.*

Hetl. 55, Bishop of Winton v. Markham; but vide Dals. 38, S. C. *contrâ*.

So, for these words, *He imprisoned me till I gave a release.*

3 Leon. 376, Lord Winchester's case cited. Freem. 221.

So, these words, *You have writ a letter to me, which I have to show, which is against the word of God, against the queen's authority, and to the maintenance of superstition, and that I will stand to prove against you,* were held actionable, and 500 marks damages given.

Cro. Eliz. 1, Bishop of Norwich v. Prickett.

So, of these words, *My Lord Mordant did know that Prude robbed Shotbolt, and bid me compound with Shotbolt for the same, and said he would see me satisfied for the same though it cost him 100l., which I did for him, being my master, otherwise the evidence I could have given would have hanged Prude.*

Cro. Eliz. 67, Lord Mordant v. Bridges.

Scan. mag. was brought for speaking these words, *You like not of me since you like those that maintain sedition against the queen's proceeding; the defendant justified by showing the occasion of speaking the words, and that the plaintiff encouraging men to preach against the Common Prayer, he only meant that he liked of those who maintained sedition (innuendo seditiosam illam doctrinam) against the queen's proceedings; and this was held a sufficient extenuation of the words.*

4 Co. 14, Lord Cromwell's case. Qu.

In *scan. mag.* for these words, *My Lord L. is a base earl and paltry lord, and keeps none but rogues and rascals like himself;* Williams and Croke, Justices, held, the action lay, for the words touch him in his honour and dignity, and may raise contempt from the people, and that, in case of nobility, general words will maintain an action. But Yelverton and Fleming seemed to incline to the contrary, and said the words touched not his life, loyalty, or dignity, but were only words of spleen; *et adjournatur*; and after the defendant died, and the writ abated.

Cro. Ja. 196, Earl of Lincoln v. Broughton.

For these words written (a) in a letter, *I have heard that your lordship*

(B) For what Words it lies.

hath sought by uncharitable means to bereft me of my life, lands and liberty, an action lies.

Moor, 142, Lord Lumley v. Fox; 4 Co. 16, S. C. (a) That the action as well lies for words written as those spoken. 2 Show. 505, pl. 467.

So, where one, on hearing that his barns were burnt down, said, *I can't imagine who it should be but Lord Sturton.*

Moor, 142, Lord Sturton v. Chaffin.

It hath been held that for these words, *The Earl of L's men by his command took the goods of H. by a forged warrant*, an action of scan. mag. does not lie, because not said the earl knew the warrant to be forged. Qu.

Gouls. 115.

An action of scan. mag. was brought for these words, *There are more Jesuits come into England since the Earl of Northampton was Lord of the Cinque Ports than ever there were before*, and held actionable.

12 Co. Earl of Northampton's case.

In scan. mag. for these words spoken by a parson in the pulpit, *The Lord of Leicester is a wicked and cruel man, and an enemy to the reformation in England*, adjudged actionable, and 500*l.* damages given.

Ventr. 60; 2 Sid. 21, Lord Leicester v. Manby.

So, for these words, *The Earl of Pembroke is of so little esteem in the country, that no man of reputation hath any esteem for him, and no man will take his word for 2*d.*; and no man of reputation values him more than I do the dirt under my feet*; and held actionable, though said they would not be so in the case of a common person.

Freem. 49, pl. 58, Earl of Pembroke v. Staniel.

If one says, *I met J S, whom I do not know, but my Lord P sent after me to take my purse*, an action of scandalum magnatum lies, though not positively said my Lord P sent him, or that it was to take the purse feloniously; which last, in case of an action by a common person, might be a good exception.

Lev. 277; Sid. 434; 2 Keb. 537, Earl of Peterborough v. Sir John Mordant; Vent. 59, S. C. adjudged, and there said that in these actions the words shall not be taken in *mitiori sensu*.

So these words, *I value my Lord Marquis of D, no more than I value the dog that lies there*, were without debate adjudged for the plaintiff, but a writ of error was brought, pending which Proby was killed, but his executors after paid the money.

Sid. 233; Keb. 813; Lev. 148, Marquis of Dorchester v. Proby.

So of these words, *My Lord S may kiss my a—, I care not a t— for him, he keeps none but a company of rogues about him*: on not guilty pleaded, and a trial at bar, the plaintiff had a verdict and 100*l.* damages.

Pasch. 27 Car. 2, in B. R., Lord Salisbury v. Charles Arthur.

If one says of a peer, *He is an unworthy man, and acts against law and reason*, an action of scandalum magnatum lies, notwithstanding the words are general, and charge him with nothing certain; and so adjudged by North, Wyndham, and Scrogs against the opinion of Atkyns, who said the statute extended not to words of so small and trivial a nature, but to such only as were of greater magnitude, by which discord might arise, &c., and therefore the words *horrible lies* were inserted in the statute. Note.—The

(C) The Proceedings in this Action.

rule laid down by the court in this case was, that words should not be construed either in a rigid or mild sense, but according to the genuine and natural meaning, and agreeably to the common understanding of all men.

2 Mod. 151, &c.; Mod. 232; Freem. 220, pl. 227, *Ld. Townsend v. Dr. Hughes*. [The damages in this case were 4000*l.*, but the court refused a new trial on the ground of excessiveness.]

(C) The Proceedings in this Action.

HERE I shall take notice of the following particulars:—That it is now clearly agreed, that though there be no express words in the statute which give an action, yet the party injured may maintain one on this principle of law, that when a statute prohibits the doing of a thing, which if done might be prejudicial to another, in such case he may have an action on that very statute for his damages.

2 Mod. 152.

That though the action is to be brought *tam pro domino rege quam pro se ipso*, yet the party is to recover all the damages.

1 P. Wms. 690.

That if the words are actionable at common law, the peer hath his election to proceed on the statute or at common law.

Freem. 49, pl. 58.

It hath been held, that this being a general law the plaintiff need not recite it particularly, and that if he sets forth so much thereof as shows his case to be within the statute, it is sufficient.

Cro. Car. 136; 2 Sid. 21; Freem. 425, pl. 572.

It is now settled, that no new trial is to be granted in *scandalum magnatum* for excessive damages; which point seems to have been determined in the before-mentioned case of *Lord Townsend v. Dr. Hughes*, where the jury gave 4000*l.* damages.

2 Mod. 151; Mod. 231.

In *scandalum magnatum* the plaintiff declared that the defendant spake these words of him, *My Lord of London is a bold, daring, impudent man for sending heads of divinity to his clergy in these parts contrary to law, ad damnum 2000*l.**, which sum the jury gave in damages. Wallop and Williams, for the defendant, moved for a new trial, in regard there was no proportion betwixt the scandal and the damages, and likewise because there was no particular damage proved at the trial; the defendant also had made an affidavit that he was not worth 2000*l.* at the time of the action brought, nor since; but notwithstanding the court refused to grant a new trial.

Hil. 33, 34; Car. 2, in *C. B.*, *Bishop of London v. Edmond Hiekeringhill*.

It has been ruled, that in *scandalum magnatum* the defendant cannot justify, let the words be ever so true, because the action is brought *qui tam*, in which the king is concerned; but it has been held that the defendant may explain the words, by showing the occasion of speaking them, and thereby extenuate the meaning of them, as was done in *Lord (a) Cromwell's case*.

2 Mod. 166; Freem. 221; Poph. 67. (a) 4 Co. 14, *suprà*.

In *scandalum magnatum* the court will never change the venue on the common affidavit that the words were spoken in another county, because

Scire Facias.

a scandal raised on a peer of the realm reflects on him through the whole kingdom, and he is a person of so great notoriety, that there is no necessity of his being tied down to try his cause among his neighbourhood.

Carth. 400; 2 Salk. 668, pl. 3.

As in the case of Viscount Stamford v. Nedham, where the action was laid in London, and the defendant moved to change the venue, for that he was prohibited to stay in London, having been in arms against the king; but the motion was denied; the plaintiff being a peer of parliament then (a) sitting at Westminster, and having election to lay his action where it is most convenient for himself; and there is the less reason for removing it, because the action is as well on behalf of the king as himself.

Lev. 56; Keb. 514. (a) Vide 1 Sid. 185; 2 Mod. 216.

But, in the case of Lord Shaftesbury v. Graham, the court in *scandalum magnatum*, on a special affidavit of the plaintiff's power and interest in the county where the action was laid, made a rule for changing the venue. But note, that the books which report and cite this case mention it as a case of the times, and that it was owing to the great influence that lord had in the city of London, that the court varied from the general rule, which rule hath ever since, and notwithstanding this case, been adhered to.*

2 Jon. 298; Vent. 363; Skin. 40, pl. 9; 2 Show. 197, pl. 200. *In the case of Lord Sandwich v. Miller, in B. R., the court refused to change the *venue*, after solemn argument, though a rule to show cause was granted.

It hath been held, that the statute which appoints that actions for words shall be commenced within two years, does not extend to *scandalum magnatum*.

Cro. Car. 535.

Also it hath been held, that the statute 27 Eliz. c. 8, for bringing a writ of error into the Exchequer Chamber, does not extend to this action.

Cro. Car. 535; Sid. 143.

It hath been held, that in an action of *scandalum magnatum* special bail is not required.

3 Mod. 41.

It hath been held, that no costs are to be given the plaintiff on his obtaining a verdict.

2 Show. 506. ¶ *Qu.* whether any action has been brought on this statute since 8 Ann., Duke of Richmond v. Costello, 11 Mod. 234 ?

SCIRE FACIAS.

(A) The Nature of the Writ.

(B) In what Cases it is a proper Remedy.

(C) In what Cases necessary; and herein, who are to be the Parties to it, and of the Privy required; And herein,

SCIRE FACIAS.

(A) The Nature of the Writ.

1. *Of the Scire Facias to revive Judgments, and after what Time necessary.*
2. *Of the Scire Facias on Recognisances and Statutes.*
3. *Of the Scire Facias on Letters Patent.*
4. *Scire Facias by and against Executors and Administrators.*
5. *By and against Heirs and Terre-tenants.*
6. *By and against Husband and Wife.*
7. *Scire Facias against Bail.*

(D) The form of the Writ and Proceedings, and how far it must pursue the Nature of the original Action.

(E) Pleadings to a *Scire Facias*.

(A) The Nature of the Writ.

A SCIRE FACIAS is deemed a (a) judicial writ, and founded on some matter of (b) record, as judgments, recognisances, and letters patent, on which it lies to enforce the execution of them, or to vacate or set them aside. And though it be a judicial writ, or writ of execution, yet it is so far in (c) nature of an original, that the defendant may plead to it, and it is in that respect considered as an (d) action; and therefore it is held, that a release of all actions, or a release of all executions, is a good bar to a *sci. fa.*

Lit. § 505; Co. Lit. 290 b, 291 a; F. N. B. 267; [1 Term R. 268; 2 Wils. 251; 2 Bl. R. 1227; 2 Term R. 46.] (a) Upon a fine *sur grant et render* of an advowson a *sci. fa.* shall be granted; for this is a judicial and no original. 2 Inst. 470. β A *scire facias*, although a judicial writ, must be considered as an original action, to which the defendant may plead, and, therefore, it must contain a legal cause of action on its face. *Andress v. The State*, 3 Blackf. 110. γ (b) That in many cases a *sci. fa.* is granted partly upon a record, and partly upon such a suggestion, without which no proceeding could be on the record. 2 Inst. 470.—That the rule holds not always good. That where one comes in by matter of record, he ought not to be ousted without a *sci. fa.*; for he, whose lands are extended upon an *elegit*, upon a recognisance, after the debt be satisfied, may enter without a *sci. fa.*; but the donee of a statute, because he is to have costs or damages which be not known, cannot be ousted without a *sci. fa.* Cro. Car. 589; 4 Co. 67; 2 Roll. Abr. 497.—*Sci. fa.* lies in Chancery on a patent; for the patent being enrolled is a record of that court; but, where *sci. fa.* is brought for the forfeiture of a patent or other thing in another court, there ought to be an office found in such other court before the *sci. fa.* issues, except the forfeiture appears of record in the same court, whereupon to found the *sci. fa.* 3 Lev. 223. (c) In nature of an original. Skin. 682; Comb. 455.—There are many *sci. fa.* in the register among the original writs. 10 Mod. 259.—[A *scire facias* to repeal letters patent is an original writ. *Rex v. Eyre*, 1 Stra. 43.] (d) Is in nature of a declaration, Sid. 406,—and may be formed according to the subject-matter. Carth. 107.

|| But for some purposes it is only considered as a continuance of the original action. As where interlocutory judgment was obtained against a testator, and pending that action the testator's attorney agreed that no writ of error should be brought; on the testator's death a *scire facias* being brought on the judgment against his executors, the court held that they could not bring a writ of error; for they were bound by the agreement of the testator's attorney, as the *scire facias* was not a new action, but only a continuance of the old one.

Wright v. Nutt, 1 Term R. 388.

ρ When only a part of the debt has been made under an execution, a *scire facias* issued afterwards should be special *quo ad residuum*; but if it be general, no objection to it can be made after verdict.

Sülle v. Wood, Cox, 118. γ

(B) In what Cases it is a proper Remedy.

And, though it be held that a *sci. fa.* is in nature of an original, yet it hath been adjudged, that no writ of error lies into the Exchequer Chamber on a judgment given in B. R. on a *sci. fa.*, the statute 27 Eliz. c. 8, which gives the writ of error, mentioning only suits or actions of debt, detinue, covenant, account, actions upon the case, *ejectione firmæ*, or trespass.

Cro. Car. 286, 300, 464; Roll. Rep. 264; Vent. 38; Salk. 263.

Also it was formerly held, that the plaintiff could not in a *sci. fa.* recover costs; but this is now remedied by the statute 8 & 9 W. 3, c. 11, § 3.

Dals. 95; 3 Buls. 322; [3 Burr. 1791.]

(B) In what Cases it is a proper Remedy.

If a bill of exceptions be tendered to a judge, and he sign it and die, a *sci. fa.* lies against his executors or administrators to certify it.

2 Inst. 438.

So, if a man be outlawed, who at the time of the outlawry was beyond sea in the king's service, and he bring a writ of error to reverse this outlawry, and obtain a certificate of the marshal of the king's host (as he ought to do;) in this case, notwithstanding the marshal dies, yet he may assign the same for error, and upon showing the certificate have a *sci. fa.* to the executors or administrators of the marshal.

2 Inst. 428, vide tit. *Outlawry*.

A *sci. fa.* lies against a sheriff who levies money on a *fi. fa.* and retains it in his hands.

Hutt. 32; Cro. Ja. 514; And. 247; Godb. 276.

So, a *sci. fa.* will lie for a fine assessed on the party at the justice seat of a forest.

Cro. Car. 409.—Lies to have execution of damages recovered in an appeal. Cro. Ja. 549.

Upon an *elongavit* returned by the sheriff, a *sci. fa.* lies against the pledges in a replevin, by plaint in the sheriff's court, transmitted to the *hustings*, and so to B. R. by *certiorari*.

Comb. 1.—That a *sci. fa.* lies against the sheriff for taking insufficient pledges in replevin. Hutt. 77.*—* *Scire facias* in replevin will lie on plaint, or on writ. One may be bail with others for himself; if *elongat.* is returned for the principal, the pledges may be sued; if the writ of inquiry is reducible to a certainty, it is enough; and discontinuance is nothing in this suit, unless it had been void or a nullity. *Mulso v. Shere*, T. 4 Geo., Fort. 330.

If one hath judgment in a *quare impedit*, and after, and before execution, the party is outlawed, the king may have a *sci. fa.* to execute the judgment, the king having privy enough in this case to sue execution, because the thing (*a*) as it was in the plaintiff vested in the king.

Moor, 241; Cro. Eliz. 44, 325. (*a*) Where having the thing gives a sufficient privy to maintain a *sci. fa.* Keilw. 168, 169.

On a motion to discharge an outlawry which was pardoned by the act of oblivion, the court held, that it could not be done on motion, but that the party must bring a *sci. fa.* on the act.

Stil. 348. On a motion for a *sci. fa.* to avoid a judgment, made void by the general act of pardon, 12 Car. 2, the court doubted whether this was to be done by *sci. fa.* or *audita querela*. Sid. 231.

Where one obtained judgment, and after had judgment in a *sci. fa.* thereupon, and then became a bankrupt, and the original judgment was:

(C) In what Cases necessary. (*To revive Judgments.*)

assigned by the commissioners to S S, upon motion it was entered to entitle him to the benefit of the judgment in the *sci. fa.* without bringing a new one.

5 Mod. 88.

A *sci. fa.* being brought by the successor of a president of the college of physicians in London, upon a judgment in debt obtained by him upon the statute 14 H. 8, c. 5, against practising physic in London without a license, he having died before execution; it was objected on demurrer, that the *sci. fa.* ought to have been brought by the executor or administrator of him who recovered; but, without argument, the court held, that the successor might well maintain the action, for the suit is given to the college by a private statute, and the suit is to be brought by the president for the time being; and he having recovered in right of the corporation, the law shall transfer that duty to the successor of him who recovered.

Cro. Ja. 159, Dr. Atkins v. Gardener.

A *sci. fa.* was brought in the court of C B, to reverse a fine in ancient demesne; and it was ruled, that no such writ lay, but that the party ought to bring his writ of deceit.

Mich. 7 W. 3, in C. B., Zouch v. Thompson.

(C) In what Cases necessary; and herein, who are to be Parties to it, and of the Privy required: And herein,

1. Of the Scire Facias to revive Judgments, and after what Time necessary.

THERE have been different opinions whether a *sci. fa.* lay at common law; but this doubt, says my Lord Coke, arose for want of distinguishing between personal and real actions.

2 Inst. 469.

At (a) common law, if after judgment given, or recognisance acknowledged, the plaintiff sued out no execution within the year, the plaintiff or his conusee was driven to his original upon the judgment, and the *scire facias* in personal actions was given by the statute of (b) Westm. 2, 13 Ed. 1, st. 1, c. 45.

(a) In 2 Salk. 600, pl. 8; Ld. Raym. 669. Holt, C. J., said he was not satisfied that no *scire facias* lay at common law upon a judgment in a personal action; for the words *sive alia quæcunque irrotulata*, in the statute of Westm. 2, 13 Ed. 1, st. 1, c. 45, came after *contractus et conventiones*, and therefore could not be construed of judgments, but that the law had been taken to be otherwise, and therefore he must submit. (b) Which see explained, 2 Inst. 469, 470; and that this statute gave the *sci. fa.* in personal actions. Co Lit. b, 290 b; Sid. 351; 3 Co. 12; 4 Mod. 248; 3 Mod. 189; 2 Reeve's Hist. 190.

¶ If execution have issued within a year and day after judgment, an *alias* may be taken out without a *scire facias* to revive the judgment.

Lewis v. Smith, 2 Serg. & Rawle, 142. See Pennock v. Hart, 8 Serg. & Rawle, 377; Dunlap v. Spear, 3 Binn. 169.

A *levari facias*, issued several years after a judgment, without a *scire facias* to support it, is not void, but voidable.

Vastine v. Fury, 2 Serg. & Rawle, 426.

But in real actions, or upon a fine, though no execution was sued within a year after the judgment given or fine levied, yet after the year a *sci. fa.* lay for the land, &c., (c) because no new original lay upon the judgment or fine.

2 Inst. 470. (c) The reason why it lay in this case was, for that in a real action one

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could have no other advantage of his judgment; but in a personal action, debt would lie on the judgment. 7 Mod. 64, 66.

A *sci. fa.* lay as well in mixed as real actions, and upon a judgment in an assize. So, it lay upon a judgment in a writ of annuity.

Salk. 258; 2 Salk. 600; 2 Ld. Raym. 806.

It hath been adjudged, that if there be judgment in ejectment, and no execution sued thereon in a year and a day, an *habere facias possessionem* cannot be sued out after without a *sci. fa.* And Holt, C. J., said, that as to the possession of the land, an ejectment was real, and the only remedy a termor for years had, and that a recovery therein bound the right of inheritance.

Comb. 250; 7 Mod. 64; and vide Sid. 317, 351; 2 Keb. 307; Skin. 161; 3 Lev. 100; Lutw. 1268.

But, though after a year and a day there can be no execution of a judgment without a *sci. fa.*, yet, if the plaintiff hath been delayed by a writ of error, he may take out execution within a year and a day after the judgment affirmed.

5 Co. 88; Moor, 566, pl. 772; Cro. Eliz. 706; Godb. 372; Palm. 448, and 2 Inst. 471, where it is said, that though it had been otherwise holden, yet common experience and later resolutions are so. β When the plaintiff is prevented from taking out execution by the defendant, he may take out execution without a previous *scire facias*. United States v. Hanford, 19 Johns. 173. γ

And therefore it hath been adjudged, that if a man recovers debt or damages in B. R., and after within the year the defendant brings a writ of error in the Exchequer Chamber, where the first judgment is affirmed after the year expired, yet the recoverer may have execution by *capias* or *fi. fa.* within the year after the affirmance, without a *sci. fa.*, for the affirmance is a new judgment.

Roll. Abr. 899; Lan. 20, Dennis v. Drake; Cro. Eliz. 416, S. P.

So, if after the year after the recovery the defendant bring a writ of error, and the judgment is affirmed, though before the writ of error brought the recoverer was put to his *sci. fa.*, yet this affirmance is a new judgment, and the recoverer may have within the year after the affirmance a *fi. fa.* or *capias* without a *scire facias*.

Roll. Abr. 899; and vide Palm. 449; Latch. 193.

So, if he be nonsuit in the writ of error, or if the writ of error be discontinued; for though in these cases there is not any new judgment given, yet the bringing of the writ of error revives the first judgment.

Cro. Ja. 364; Roll. Rep. 104, 153. [But *qu.* of this—it should seem from Rolle's Report, that a *scire facias* is necessary in this case.]

If A recovers against B in B. R. damages and costs, and thereupon hath judgment against the bail after a *sci. fa.*, &c.; and after B and the bail join in a writ of error upon the statute in the Exchequer Chamber, and after the year and day pass; in this case, notwithstanding this writ of error, the court of B. R. may grant execution; for this is a void writ of error, and as if no writ of error had been brought, and therefore it shall be no continuance of the first judgment; but the year and day being past, the plaintiff cannot have execution without a *sci. fa.*, though the year passed after the writ brought.

Roll. Abr. 899; Trin. 9 Car. 1, Barns v. Hill.

If upon a judgment there be a *cesset executio* for a year after the judgment.

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ment, the plaintiff within the year ||after the *cesset executio* ends|| may take out execution without a *sci. fa.*

6 Mod. 14, 288; 7 Mod. 64; 2 Salk. 600, pl. 9; 2 Ld. Raym. 806; *℔* Hiscocks v Kemp, 5 Nev. & M. 113; 1 Har. & Wol. 384. *g*

℔ When the lessor of the plaintiff dies after judgment in ejectment, the execution may issue in the name of the lessee, without the necessity of a *scire facias*.

Lessee of Penn v. Kline, Pet. C. C. R. 446.

When at the request, or with the consent of the defendant, or by an injunction from Chancery obtained by him, an execution is delayed for more than a year and a day, the plaintiff may take out an execution without a previous *scire facias*.

United States v. Hanford, 19 Johns. 173.

If an execution issue after a year and a day, without a revival of judgment, it is not void, but voidable at the suit of the party only against whom it issued.

Jackson *ex dem.* M'Crea v. Bartlett, 8 Johns. 361; Jackson *ex dem.* Livingston v. De Laney in error, 13 Johns. 537; 15 Johns. 169; 16 Johns. 537. *g*

[But, if the plaintiff do not take out execution within a year after the *cesset executio* is determined, he must first sue out a *scire facias*.

2 Crom. 102;] *℔* Lewis v. Smith, 2 S. & Rawle, 142. *g*

But it hath been held, that where execution hath been taken out after the year and day, it is not void, but voidable only.

3 Lev. 404; Salk. 273, pl. 4; *℔* Vastine v. Fury, 2 Serg. & R. 426; Bailey v. Wagoner, 17 S. & R. 327; Speer v. Sample, 4 Watts, 373; Righter v. Rittenhouse, 3 Rawle, 273. *g*

But, though it seems agreed, that the execution being stayed by the act of the defendant, the plaintiff may after a year and day take out execution without a *sci. fa.*, yet it hath been held, that if the execution is stayed by injunction, though by the act of the defendant, yet the court will not take notice thereof, for they do not take notice of Chancery injunctions as they do of writs of error. [Besides, it might be no breach of the injunction to take out execution within the year, and continue it down by *vicecomes non misit breve*, which cannot be done in the case of a writ of error. However, it should seem from a late case, that the staying of the execution by injunction will make no difference, if the court are satisfied that the injunction bill was filed merely for the purpose of delay; for the rule of reviving a judgment by *scire facias*, before execution, was intended to prevent a surprise upon the defendant, and therefore ought not to be taken advantage of by one who, so far from being surprised by the delay, has himself been the cause of it.

Booth v. Booth, Salk. 322; 1 Stra. 301; and vide tit. *Injunction, ante*, vol. v.; Michell v. Cue, 2 Burr. 660; ||and see Tidd's Prac. 1156, (8th ed.)||

The plaintiff had recovered judgment in the Petty-bag; after which the defendant brought a bill, and had stopped the plaintiff two or three years by an injunction. It was moved, that the plaintiff at law might, under these circumstances, sue out execution without a *scire facias*, and not suffer by the act of the court. *Sed per cur.*—I cannot alter the course of the court, but must take care to preserve it; and it being above a year and a day after the judgment, let the plaintiff sue out his *scire facias*. But the reporter adds, *Qu.* whether in this case the plaintiff Hodson could not have

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taken out execution, and continued it by *vicecomes non misit breve*, agreeably to what was said by the court of B. R. in the above case of Booth v. Booth.

Hodson v. Earl of Warrington, 3 P. Wms. 36.

Judgment of Michaelmas term, 1731, signed November 13, *fi. fa.*, bore test November 28, in Michaelmas term following. The defendant moved to set aside the *fi. fa.* as irregular, the judgment not being revived by *sci. fa.*, and the *fi. fa.* not being issued within the year. The plaintiff insisted that the *fi. fa.* being issued within the fourth term from the time of signing judgment, it was regular, and produced an affidavit that execution had been some time stayed by an injunction out of Chancery. The court held the injunction to be quite out of the case, and that the year is to be computed from the day of signing the judgment, and therefore set aside the *fi. fa.*

Sympson v. Gray, Barnes, 197.

If a *fi. fa.* or *elegit* be sued, and no execution be had thereon, there may be another *fi. fa.* or *elegit* several years after without a *scire facias*, if continuances are entered from the first *fi. fa.* or *elegit*.

Welden v. Grey, 1 Sid. 59.

|| Judgment being entered on a bond to secure the quarterly payments of an annuity, and a *fi. fa.* having issued for the arrears of the last half-year, a second *fi. fa.* may be taken out for the next quarter, without reviving the judgment by *scire facias*.

Scott v. Whalley, 1 H. Black. 297; and see Powis v. Powis, 6 Moo. 517.||

So, if a *fi. fa.* be taken out within the year, and a *nulla bona* returned, and continued down several years, a *capias ad satisfaciendum* may issue without a *scire facias*. But it is otherwise, (a) if no execution be returned by the sheriff to warrant the entry of continuances upon the roll.

Aires v. Hardress, 1 Stra. 100; Low v. Peart, Barnes, 210, S. P. in C. P. (a) Blayer v. Baldwin, 2 Wils. 82; Barnes, 213, S. C.

The defendant obtained a *supersedeas* for want of a declaration in an action of debt on a judgment, and was afterwards taken in execution by a *capias ad satisfaciendum* issued after a year and a day from the time of the judgment, without any *sci. fa.* to revive. The defendant brought his action for false imprisonment, and the plaintiff justified under the *ca. sa.* The defendant then applied to set aside the *ca. sa.*, and it appearing that a *capias ad respondendum* only, and not a *ca. sa.*, had issued within the year, there was nothing to warrant the continuance of a *ca. sa.* on the roll. The rule was therefore made absolute to set aside the *ca. sa.*

Martin v. Ridge, Barnes, 206.

A *scire facias* seems to be necessary in order to warrant an execution upon the 31 G. 2, c. 28, § 20, or lords' act.

1 Term R. 80.]

If judgment be given in debt, and no execution sued out within the year, yet the plaintiff may after have an award of an *elegit* on the roll of the judgment as of the same term with the judgment, and thence continue it by *vicecomes non misit breve*; so held on a motion to set aside the execution. And though the court said, that an *elegit* ought to be actually taken out within the year, yet, being informed by the clerks of the court that it had been the practice for many years to make such entry, &c., it

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was said to be the law of the court, and they ordered the execution to stand.

Carth. 283; Seymour v. Greenvil, 2 Show. 235, pl. 233, S. P.; Comb. 232, S. P., where it was said by Sir Sam. Asty, that it was not the practice to award an *elegit* on the roll, because attorneys think they can have no execution after; but it was said by the court to be a mischievous practice.

||But in a late case the Court of King's Bench were of opinion, that there was no reason to distinguish between an *elegit* and other executions; and therefore, where an *elegit* had been issued after a year without a *scire facias*, or any previous writ sued out within the year to warrant it, the court set it aside for irregularity, although the award of an *elegit* had been entered on the roll with continuances after the rule was moved for.

Putland v. Putland, E. 57 Geo. 3, Tidd's Pract. 1155, (8th ed.); 2 Chitt. R. 384, S. C.||

If the demandant or plaintiff take his process of execution within the year, though it be not served within the year, yet, if he continue the same, he may have execution at any time after the year.

2 Inst. 471; Co. Lit. 290 b; and vide 2 Leon. 77, 78, 87; 3 Leon. 259; 4 Leon. 44; Sid. 59; Keb. 159; 6 Mod. 288.

If the plaintiff delay the executing of a writ of inquiry, till a year after the interlocutory judgment, he cannot do it after without a *sci. fa.*

Cases in B. R. Pasch. 13 W. 3, Haw v. Cuton; ||12 Mod. 500; *sed qu.* whether a term's notice is not in this case sufficient? See Tidd, 1154, (8th ed.)||

In the case of the king there need not be any *sci. fa.* after the year and day.

2 Salk. 603:

If a judgment be above ten years' standing, the plaintiff cannot sue a *sci. fa.* without a motion in court; (a) if under ten, but above seven, he cannot have a *sci. fa.* without a motion at side-bar. *Note*—If after such motion, and judgment revived by *sci. fa.*, the defendant dies before execution, the plaintiff must sue a new *sci. fa.*, but may have it without motion, for the judgment was revived before.

2 Salk. 596, pl. 3, Hardisty v. Barny. ||(a) In the K. B., if the judgment be above ten and under fifteen years old, the rule is absolute in the first instance, on an affidavit of the debt being due, &c., and may be drawn up on motion paper signed by counsel: if it be above fifteen years old, there must be a rule to show cause. Tidd's Pract. 1157. —In the C. B., where the judgment is more than ten years old, the court must be moved in term time for leave to issue a *sci. fa.*, and will order that no execution be taken out thereon without a return of *sci. feci*, or an affidavit of personal notice to the defendant. 2 Black. R. 1140.—Therefore, where a writ of *scire fa.* was issued more than ten years after judgment, on a motion paper signed by a serjeant in vacation, and the defendant had no personal notice of the proceeding, the court set aside the judgment signed thereon for irregularity, 1 Bro. & B. 381; and if the judgment be above twenty years old, there must be a rule to show cause. 2 Sel. p. 286, Tidd's Pract. 1157, (8th ed.,) and cases there cited.||

After a judgment, if the plaintiff within the year sues a *sci. fa.*, he cannot after have a *capias* within the year till he hath a new judgment in the *sci. fa.*

Roll. Abr. 900, Trin. 13 Car. 1, Roberts v. Pising.

2 Where the creditor, supposing that his judgment was in full life when it was dead in law, issued an execution, and under it the officer compelled the payment, and it was endorsed satisfied, and the debtor afterwards brought an action of trespass against the officer for the unlawful levy, and recovered a greater sum in damages than the amount of such levy and

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compulsory payment, and it appeared that the creditor had indemnified the officer; on a *scire facias* on this judgment, held, that the creditor was entitled to judgment in his favour.

Stoyel v. Cady, 4 Day, 222.^g

2. Of the Sci. Fa. on Recognisances and Statutes.

Recognisances and statutes are considered as judgments, being obligations solemnly acknowledged, and entered of record, and the *sci. fa.* on those is the judicial writ, and (a) the proper remedy the conusee hath. But herein we must distinguish (b) between recognisances at common law and statutes merchant, &c.; for upon the former, if the conusee did not take out execution within a year after the day of payment assigned in the recognisance, he was obliged to commence the suit again by original; the law presuming the debt might have been paid, if he did not sue execution within the year after the money became payable. But this law is altered by Westm. 2, 13 Ed. 1, st. 1, c. 49,* by which the conusee hath a *sci. fa.* given him to revive the judgment and put it in execution, if the conusor cannot stop it by pleading such matters as the law judges sufficient for that end, such as a release, &c. But the conusee of a statute merchant, &c., may at any time sue execution on them without the delay or charge of a *sci. fa.*

Lit. Rep. 89. (a) That a *capias* lies not on a *sci. fa.*, *Brown*, 83. (b) *Co. Lit.* 291; 2 Inst. 469; F. N. B. 296; *Bro. Recog.* 37. ||*Ch. 45.||

Also, as to recognisances at common law, and statutes and recognisances introduced by statute law, we must further distinguish, that if on the first the conusee dies before the execution sued, his executor shall not sue it, even within the year, without bringing a *sci. fa.* against the conusor. The reason is, because the law presumes the debt might have been paid to the testator, and therefore will not suffer the debtor to be molested, unless it appear that he hath omitted to perform the judgment. And this is to be done by *sci. fa.* brought by the executor, for the alteration of the person altereth the process at common law. But this tending to delay, the *sci. fa.* is taken away in statutes and recognisances by statute law, by the several acts of parliament which introduce them; and therefore upon the death of the conusee of a statute merchant, &c., his executors may come into Chancery, and upon their producing the testament and the statute, shall have execution without a *sci. fa.* as the testator himself might.

2 Inst. 395, 471; *Bro. Stat. Merch.* 16, 43, 50.

If a man be bound in a recognisance to the king, upon condition to be of good behaviour, &c., he cannot be indicted for (c) breach of the good behaviour, by which he forfeits his recognisance, without a *sci. fa.*; for if a *sci. fa.* had been brought, he might have pleaded some matter in discharge thereof.

4 Inst. 181; *Roll. Abr.* 900. (c) What shall be said a breach, vide *Cro. Car.* 49^a —And how to be assigned, vide 3 *Bulst.* 220; *Cro. Ja.* 412; *Stil.* 369.

If a man acknowledge a recognisance to be paid at a day within the year after the date of the recognisance, in this case he may have execution by *fi. fa.* or *elegit* within the year after the day of payment, though the year be past from the date of the recognisance.

21 E. 3, 22 b; *Roll. Abr.* 899, 900; 2 Inst. 421.

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If A enters into a recognisance or statute, &c., to B, and the sum is made payable at three several days, as 20*l.* at each day, the whole debt being 60*l.*, when the first day of payment is elapsed, the conusee may have execution for 20*l.* immediately, and so for the rest as it becomes due, without waiting for the last day of payment, as he must have done if the debt had been due by bond. And this holds as well on recognisances at common law as upon statutes. And the reason is, because these are in nature of three several judgments.

2 Roll. Abr. 468; Co. Lit. 292; 2 Inst. 395, 471; 5 Co. 81.

If a man recovers an annuity, he shall have execution for every time that occurs after by *fi. fa.* or *elegit* within the year after the time incurred, though the year be past from the judgment, but not after the year without a *sci. fa.*

Roll. Abr. 900; 2 Inst. 471; Salk. 258, pl. 11; 2 Ld. Raym. 806; 2 Salk. 600, pl. 9.

If two acknowledge a recognisance of 100*l.* *quilibet eorum in solido*, that is, jointly and severally, the conusee may sue several *sci. fa.* against the consors upon this recognisance.

2 Inst. 395.

So, if A, B, and C, bind themselves jointly and severally, in a statute, the conusee may have execution against one of them alone, or against all together; but he cannot have execution against two only, for the execution must pursue the statute which is joint or several, but execution against two is neither one nor the other.

2 Roll. Abr. 468. *℥* Where there are several recognisors, there may be one writ of *scire facias*, one judgment, and one execution. *State v. Stout*, 6 Halst. 124.*g*

By the statute 32 H. 8, c. 5, it is enacted, That if lands delivered in execution on just cause be recovered from the tenant by execution before he hath received his whole debt, the conusee (and, by a favourable construction of the statute, his executors) may have a *sci. fa.* out of that court where the execution is first awarded, or out of any court where the record shall be moved by writ of error and affirmed. But this statute is to be construed under these restrictions, that where the conusee hath remedy for part of his debt *in presenti*, or *futuro*, for the whole or for part, there he can have no aid or benefit of this statute.

Co. Lit. 290; 2 Inst. 678; 4 Co. 67.

Herein likewise we may consider, that a *sci. fa. ad rehabendam terram* lies for avoiding executions on these statutes, which differs from the writ of *audita querela*, for that avoids an execution unjustly obtained at first; but the *sci. fa.* allows the execution just at first, but shows that the end for which it was granted being obtained, it ought of consequence to cease.

2 Roll. Abr. 480.

And therefore if the consor, after his land is extended, tenders the money to the conusee, who refuses it, or if the debt, with all costs and damages, which the statute *de mercatoribus* allows, be satisfied from any casual profit arising from the land, in these cases the consor is put to his *sci. fa.*, and cannot enter. But in case of an *elegit* on a recognisance at common law, when the conusee is answered his debt by the perception of the certain and usual profits of the land, the debtor may enter, and is not put to his *sci. fa.* Yet in this case, if the creditor be satisfied by an acci-

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dental perquisite, there the debtor cannot enter, but must have a *sci. fa. ad rehabendam terram*. And the reason of these distinctions is, because in the first case the execution issues according to the direction of the statute, not only till the principal debt be levied, but all costs and damages arising by reason thereof; and therefore, since the damages are not ascertained, the record will always oppose an entry, which is but an act in *pais*, and cannot be turned into a defeasance of a matter of record till such damages are settled on record in the *sci. fa.* But in the second case, when the debt is certain, and the value of the land ascertained in the extent, there, when such debt is paid by perception of such settled profits, there is no act on record to oppose an entry, and therefore an entry is lawful. But, where the satisfaction arises from accidental profits which do not appear in the extent, this then is still matter of record in opposition to the entry, since such accidental profits do not appear in the valuation of the land settled by the extent on record.

4 Co. 67; 2 Inst. 398; 2 Roll. Abr. 480, 497.

So, if lands be extended on a statute, and the time of the extent expired, the conusor is put to his *sci. fa.*, because the conusee may have cause to hold the land longer than the time of extent, for he may retain it till he has received his costs of suit and reasonable expenses.

4 Co. 67; 2 Roll. Abr. 497.

But no *sci. fa.* lies upon a general averment that the conusee has levied the debt before the time of the extent expired, because this may happen by the conusee's industry in improving the land, which the debtor can take no advantage of. So, if the land taken in execution be really worth 20*l.* *per annum*, but it is extended only at 10*l.*, though by this computation it is evident the conusee might levy the debt before the time of the extent is ended, yet the conusor, upon an averment that the debt is levied, shall have no *sci. fa.*, because that would be contrary to the record, and the court is to judge of the value according to the extent; by which it appears that the debt is not levied. But, if the conusee has levied part by cutting wood, and has received the residue, as appears by an acquittance, in this case he shall have a *sci. fa.* The reason is, because the end of the extent being only to satisfy the conusee his reasonable demands, whenever it appears to the court that they are answered, whether it be by the perception of the profits or otherwise, they grant a *sci. fa.* to avoid the extent.

2 Roll. Abr. 482.

If the conusee has levied part of the debt according to the extent, the conusor, upon tender of the residue in court, shall have a *sci. fa.* to recover the lands within the time of the extent; for here it appears on record how much was due at first, how much was paid, and what remains due and in arrear. But, if the conusor had tendered the remainder of the debt out of court, or, if in court, he had only offered to come to an agreement with the conusee, in neither of these cases shall the *sci. fa.* be granted, because it does not appear on record that the debt is paid.

2 Roll. Abr. 482.

The grantee of a reversion may bring a *sci. fa.* against him who hath execution of the lands on a statute-merchant, on alleging that he hath satisfaction by some casual profits, though he was not party or privy

Dyer, 1, pl. 6.

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[*Scire facias* in the petty-bag will lie on a bond given to the late king, his executors and administrators, as within 32 H. 8, c. 39.] || Although it was contended that, according to these words, it was payable to him in his natural capacity. ||

[*Rex v. Bradford*, 2 Ld. Raym. 1327.]

Scire facias lies on a recognisance, to the commonwealth or to a party, if the recognisance be duly entered of record in the proper court having competent jurisdiction.

Commonwealth v. Green, 12 Mass. 1; *Bridge v. Ford*, 4 Mass. 641; 7 Mass. 209.

3. Of the *Scire Facias* on Letters Patent & Franchises.

1. On Letters Patent.

The writ of *sci. fa.* to repeal letters patent lieth in three cases: 1st, When the king by his letters patent doth grant by several letters patent one and the self-same thing to several persons, the first patentee shall have a *sci. fa.* to repeal the second: 2dly, When the king doth grant a thing upon a false suggestion, he *prærogativa regis* may by *sci. fa.* repeal his own grant: 3dly, When the king doth grant any thing which by law he cannot grant, he *jure regis*, and for the advancement of justice and right, may have a *sci. fa.* to repeal his own letters patent; and the judgment in all these cases is, *Quod prædictæ literæ patentes dicti domini regis revocentur, cancellentur, evacuentur, admullentur, et vacuæ et invalidæ pro nullo penitus habeantur et teneantur, ac etiam quod irrotulamentum eorundem cancelletur, cassetur et annihilentur.*

4 Inst. 88. *β* A state may avoid its own grant by *scire facias*. *Sevier v. Hill*, 2 Tenn. 37.

Where a patent is granted to the prejudice of the subject, the king of right is to permit him upon his petition to use his name for the repeal of it in *sci. fa.* at the king's suit; and to prevent multiplicity of actions: for such actions will lie notwithstanding such void patent: as, where the king grants a patent for holding a fair or a market without a writ of *ad quod damnum*, or where such writ hath been deceitfully executed, in such case a *sci. fa.* lies to repeal the patent.

2 Vent. 344, *The King v. Sir Oliver Butler*; 3 Lev. 220, 221, S. C; 6 Mod. 229, S. P.

And though in the above case it was urged that a *sci. fa.* did not lie to repeal such patents, because there is (a) another remedy by the common law, i. e. by assize of nuisance, *quod permittat*, &c., where the matter shall be tried by a jury and several judges, and not by one judge only, as it is in (b) Chancery; yet it was resolved, that the king has an undoubted right to repeal a patent wherein he is deceived, or his subjects prejudiced, and that by *sci. fa.*

3 Lev. 221. (a) For this vide *Dyer*, 197; 11 Co. 74; 8 Co., *Prince's case*. (b) It is the highest point of the Lord Chancellor's jurisdiction to cancel the king's letters patent under the great seal. 4 Inst. 88, vide title *Jurisdiction of the Court of Chancery*, ante, vol. 2. [This proceeding in a *scire facias* to repeal letters patent is in a particular manner derived from the great seal; for the very end of the suit is, and so is the judgment, that they be recalled into the same place whence they went forth under the great seal, that they may be cancelled, that is, that the great seal may be taken off. In the case of the Mayor and Burgesses of Liverpool against the Chancellor of the County Palatine of Lancaster, in B. R. Trin. 12 Ann., there was a *scire facias* to repeal a charter granted to that corporation under the great seal of the county palatine. To this suit a prohibition was moved for, for want of jurisdiction in the court. But it was resolved,

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that that court had jurisdiction of the cause, and, amongst other reasons which were given for that judgment, it was declared, that this authority was incident to the seal of the county palatine: that the complaint of the writ being, that the Chancellor had wrongfully put the seal to it, it was proper to be examined in that court where the seal was kept. See Mr. Yorke's argument in 1 Str. 151.]

It was likewise objected in the above case, that there ought to have been an office found before the *sci. fa.* issued, for that a *sci. fa.* is a judicial writ, and ought to be founded on a record; to which it was answered and resolved, that true it is a *sci. fa.* ought to be founded on a record; and so it is here, for the patent is a record in Chancery upon which this *sci. fa.* issued, and it is a sufficient record whereon to found it. But where the *sci. fa.* is brought for the forfeiture of a patent or other thing in another court, there ought to be found an office in such other court before the *sci. fa.* issues, except the forfeiture appears of record in the same court whereupon to found the *sci. fa.* And where the office is found, the king shall seize (a) presently upon the office found: but where the office is founded upon the office itself, as here, the king cannot seize until the forfeiture, or other defect of the patent, be tried upon the *sci. fa.*

3 Lev. 323. (a) 9 Co. 96.

§2. Franchises.

Scire facias will lie to repeal the grant of a franchise when the owner has neglected his duty.

Peter v. Kendal, 6 B. & C. 703.*g*

4. Scire Facias by and against Executors and Administrators.

One that is no party to the record, recognisance, fine, or judgment, as the heir, executor, or administrator, though they be privy, and it be within the year, shall have no writ of execution, but a *sci. fa.* to enable themselves to the suit. And so of the tenant or defendant, for the alteration of the person altereth the process. Otherwise, in the case of a statute-staple or merchant, because the process is given by other acts of parliament.

2 Inst. 471; Godb. 83; Cart. 112, 193.

But, if there be two plaintiffs in a personal action, and one of them die, that shall not put the other to a *sci. fa.* So, (b) if one of the defendants die, because the same party still remains on record.

7 Mod. 68, *per* Holt, who said that it had been so lately adjudged; for this vide Moor, 367, pl. 503; Noy, 150; Carter, 112, 122, 180, 193. (b) 5 Mod. 339, S. P. Resolved, if a suggestion of his death be made on the record, but not otherwise, because then it would not be agreeable to the record. Salk. 319, pl. 3; Ld. Raym. 244; Comb. 441; 5 Mod. 38; Carth. 404; 6 Mod. 108; and vide stat. 8 & 9 W. 3, c. 11, §7.

|| And where the cause of action is joint, and the plaintiff proceeds to outlawry against one defendant, and obtains interlocutory judgment against the other, who afterwards dies, the plaintiff cannot proceed by *scire facias* against his administrator; for the action remains joint, notwithstanding the outlawry, and consequently survives against the outlaw.

Fort v. Oliver, 1 Maul. & S. 217.||

If there be judgment against A, and thereupon a *fi. fa.* be sued out, but before execution A die intestate, there needs no *sci. fa.* to renew this judgment, but execution of the goods may be made in the hands of the administrator; for, as the party himself could not have made any defence

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to the writ of execution, there is no reason that his representative should be in a better condition.

Mod. 188, *Farrer v. Brooks*, and *vide tit. Execution.*

It was formerly held, that if an administrator, having obtained judgment against a creditor of the intestate's died, the administrator *de bonis non* could not have a *sci. fa.* on this judgment for want of a privity, but must begin anew.

Cro. Ja. 4, *Yale v. Gough*, adjudged by three judges against one. Yelv. 33, S. C.; but for this *vide* Cro. Car. 167; Latch, 40; Palm. 443; 5 Co. 9; And. 23; Moor, 40; 2 Saund. 149; Sid. 29; 2 Sid. 122.

But now by the 17 Car. 2, c. 8, it is enacted, "That where any (a) judgment after verdict shall be had, by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *sci. fa.* and take execution upon such judgment."

(a) It must appear that it was after *verdict*, for a judgment by default is not within the equity of this statute. Salk. 322, pl. 10; 2 Ld. Raym. 1072; 6 Mod. 290; 11 Mod. 34, pl. 6; ||4 Taunt. 884. || If an administrator obtains a decree, but dies before enrolment, the administrator *de bonis non* may revive this decree within the equity of this statute. 2 Vern. 237.

If an administrator *durante minoritate* brings an action and recovers, and then his time determines, the executor may have a *sci. fa.* upon that judgment.

Roll. Abr. 888; Cro. Car. 227; 2^d Brownl. 83; Godb. 104; Lev. 181; Keb. 750.

So, if such an administrator obtains judgment, he may bring a *sci. fa.* against the bail, and they cannot object that the infant is of full age, for the recognisance being to the administrator himself by name, though he be administrator *durante minori ætate tantum*, yet he may have a *sci. fa.* against the bail.

2 Lev. 37, *Enbrin v. Mompesson*.

[An administrator *durante minoritate* obtained a decree to account: the infant married, and a new administration during her minority was granted to her husband. It was objected, that such an administrator cannot at law take execution on a judgment obtained by the former administrator. But it was ordered that the defendant should answer, and that matter be saved to him at the hearing of the cause.

Coke v. Hodges, 1 Vern. 25.

A judgment on a warrant of attorney entered in the vacation against a defendant who died in the preceding term is good, and execution tested on a day *prior* to the death of the defendant may be sued out upon it. *Secus*, where it is tested on a day *posterior* to the defendant's death, for in that case the judgment must be revived against his representative by *scire facias*.

See the cases of *Heapy v. Parris*, 6 Term R. 368; *Walker v. Drawater*, Anstr. 680; *Bragner v. Langmead*, 7 Term R. 20; || *Waghorn v. Langmead*, 1 Bos. & Pul. 571; 7 East. 298. ||

|| By a subsequent statute (b) it is enacted, that "in all actions to be commenced in any court of record, if the plaintiff or defendant happen to die, after interlocutory and before final judgment, the action shall not abate by reason thereof, *if such action might have been originally prosecuted or maintained by or against the executors or administrators of the party dying*; but the plaintiff, or, if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or if he died after, then

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against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them.^(c) And if such defendant, his executors and administrators, shall appear at the return of such writ, and not show or allege any matter sufficient to arrest the final judgment, or being returned warned, or upon two writs of *scire facias*, it be returned that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the county, shall make default, that thereupon a writ of inquiry of damages shall be awarded; which being executed and returned, judgment final shall be given for the said plaintiff, his executors or administrators, prosecuting such writ or writs of *scire facias* against such defendant, his executors or administrators, respectively."^(d)

(b) 8 & 9 W. 3, c. 11, § 6. (c) See Tidd, 1169, and Append. ch. 43, § 93, &c. (d) § 129.¶

5. By and against Heirs and Terre-tenants.

It is clearly agreed, that in all real actions a *sci. fa.* lay at the common law, and, consequently, that an heir may by such writ revive and enforce the execution of a judgment obtained by his ancestor.

2 Inst. 469; 3 Co. 12; 2 Salk. 600, pl. 9; Ld. Raym. 806; Salk. 258, pl. 11; 7 Mod. 50, 64; 4 Mod. 248.

Also it is held, that if the demandant in a writ of *cousenage*, or other (a) real action, in which land and damages are recovered, has judgment, and dies, the heir shall take out execution as to the land, and the executor as to the damages.

19 E. 4, 5 b; 43 E. 3, 2; Roll. Abr. 889. (a) So, of a recovery in waste, the heir shall have execution of the land, and the executor of damages. 43 E. 3, 2; 1 Roll. Abr. 889.

And as a *sci. fa.* lies for the heir, so it lies against (b) him on a judgment obtained against his ancestor. But this is to be understood where lands in fee-simple descended to the heir, for it would be unreasonable to subject the heir to the payment of his ancestor's debts any further than the value of the assets descended. Also, if the heir be within age, he is not liable to execution during his minority, but in such case the parol must demur.

Dyer, 81; Co. Lit. 103, 290. (b) Against the heir of an heir. Cro. Ja. 186.

And though an heir only, who hath lands in fee-simple descended, is bound, yet, if A be tenant for life, remainder to B his son in tail, and A enter into a recognisance and die, C bring a *sci. fa.*, and B be returned heir and terre-tenant, and warned, but made default, he can have no *audita querela* to avoid this execution, because he had a day given in court to set aside the recognisance, it was his folly not to appear when warned.

Sid. 54; Raym. 19.

If there be a sequestration for a personal duty against the ancestor where the heir is not bound, and the defendant die, there is an end of the sequestration; and it cannot be revived against the heir, because neither the heir nor the lands are bound by such decree. But, if the decree was upon a covenant that bound the heir, and the defendant died, such decree might be revived by *subpoena sci. fa.* against the heir, to show cause against the decree, if the decree be enrolled of record, or if not, by bill of revivor; and when revived against the heir and executor,

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(which is the usual and regular way,) the sequestration also will be revived on motion, if, upon coming into court, cause is not shown why the decree should not be revived.

Vern. 143; 2 Vern. 37, 88, 89; 3 Lev. 355; [1 Ves. 184, 185.]

Where a judgment is had against one who dies before execution, a *sci. fa.* will not lie against his heir and terre-tenants until a *nihil* is returned against his executor.

Carth. 107.

βA *scire facias* issued against an heir to have execution of the lands of the deceased; before the *scire facias* issued, the heir had sold the lands: the purchaser may plead in the name of the heir, that the executor has assets.

Hamilton v. Jones, 2 Hayw. 291.g

It is laid down as a general rule, that in all cases where the (α) inheritance or freehold is affected, the tenant of the freehold is to be made a party.

And. 161. β If the defendant be an insolvent and remain in possession with the consent of his assignees, a *scire facias* against the assignees is not requisite. Clark v. Israel, 6 Binn. 391.g (α) On a motion to reverse an outlawry in treason it was objected, that there ought to be a *sci. fa.* to the Lords mediate and immediate before the outlawry shall be reversed; but held not to be necessary, the forfeiture in treason belonging to the king, and not to them. 4 Mod. 366.

Hence it hath become a settled point, not to reverse a fine without a *sci. fa.* returned against the terre-tenants; for the conusees are but nominal persons, and the terre-tenants ought not to be put out of possession without warning to defend themselves, for they may have a release to plead, or some other defence to make.

Salk. 339, pl. 4; 2 Salk. 598, pl. 2; Comb. 318; Dyer, 321; Co. Ent. 233; Cro. Eliz. 474, 739; Bridgm. 69; Moor, 524.

So, upon a writ of error to reverse a common recovery, it was said by Holt, C. J., that though the granting a *sci. fa.* in such cases against the terre-tenants is discretionary, and not *stricti juris*, yet, that it being the constant course of the court to grant it, he was of opinion not to depart from that which had been the usual course of the court, and therefore awarded a *sci. fa.*, though the case was of a hard nature, and attended with extraordinary circumstances.

Carth. 111; 3 Mod. 119; Skin. 273, pl. 1, Earl of Pembroke's case.

Regularly, the *sci. fa.* is to be awarded to the (β) heir and terre-tenants; and it seems to be the better opinion, that the terre-tenant alone is not to be charged, and that therefore until the heir be summoned, or that it be returned, that there is not any heir to be summoned, or that the heir hath not any lands to be charged, the terre-tenant ought not to be charged, for the heir may have a release to plead, or other matter to bar the execution; and his land is rather to be charged than the land of the terre-tenant, for the heir shall not have contribution against the terre-tenant, as the terre-tenant shall have. Also, if the heir be within age, the parol shall demur, and the terre-tenant shall have advantage thereof.

27 H. 6, 135; 1 E. 2, 242; 3 Co. 13 a; Cro. Car. 295, 313. || See 2 Will. Saund. 6, 7. || (β) A *sci. fa.* may be against the heir and terre-tenants, and the heir cannot object, that a *sci. fa.* ought first to issue against him. Cro. Eliz. 896, Sir Christ. Heyden's case; || 2 Saund. 7, (4). ||

Al¹ the terre-tenants are to be summoned, and therefore in a *sci. fa.* against

(C) In what Cases necessary. (*Heirs and Terre-tenants.*)

some of them they may (a) plead, that there are other (b) terre-tenants not named, and pray judgment if they ought to answer *quousque* the others are summoned. (c)

Salk. 40, pl. 9; 2 Salk. 679, pl. 7, 601, pl. 11, S. C.; 6 Mod. 134, 199, 226, S. C. (a) But, when a terre-tenant is summoned, and he doth not plead that there are other terre-tenants not summoned, he shall never afterwards have a *sci. fa.* or *audita querela* to compel the others to contribute. Moor, 524. (b) Where plea, that another was jointly seised with him, vide Roll. R. 57; 2 Jon. 122; Comb. 185. || (c) This is a dilatory plea within 4 & 5 Ann. c. 16, and requires to be verified by affidavit. Forrest, 144. ||

But it hath been doubted whether such terre-tenants could plead other terre-tenants not warned in another county, which it is now held they may; and accordingly it hath been determined, that when one terre-tenant is returned summoned upon a *sci. fa.*, he may plead that there are other terre-tenants, though in another county, and that this is not within the statute 16 & 17 Car. 2, c. 5, which relates to an extent executed.

2 Vent. 104, *Prynne v. Slaughter*.

Upon a judgment in debt a *sci. fa.* issued against the terre-tenants, and A was returned tenant, who pleaded that J S was seised of twenty acres of land, which were the defendant's at the time of the judgment given, and prayed judgment if he should be put to answer until J S was warned. On demurrer, this was held a good plea: but it was said that the writ should not abate, but that the defendant should not answer till the other was warned. And it was said by Houghton, J., that there was a diversity between a *sci. fa.* to have execution on a judgment in debt, and to have execution on a judgment in a real action; for in the last case it is no plea, for every tenant shall answer for himself, and one may lose and the other not; but in the first case each ought to be contributory for his part.

Cro. Ja. 506, *Mitchell v. Sir John Crofts*.

If there be judgment in debt against two, and one die, a *sci. fa.* lies against the other alone, reciting the death; and he cannot plead that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at (d) common law the charge upon a judgment being (e) personal, survived; and the statute Westm. 2, (13 Ed. 1, st. 1,) that gives the *elegit*, does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his execution which way he pleases, for the words of the statute are *sit in electione*. But if he should, after the allowance of this writ, and revival of judgment, take out an *elegit* to charge the land, the party may have a remedy (g) by suggestion, or by *audita querela*.

Lev. 30; Raym. 26; Keb. 92, *Edsar v. Smart*. (d) 1 E. 3, 13, pl. 41; 3 E. 3, pl. 37; 29 Ass. pl. 37; 29 E. 3, 29. (e) For the difference between a real and a personal execution, and that a personal execution will survive, though a real one will not, vide 3 Co. 14; Yelv. 209; Raym. 153; 2 Keb. 3, 331; 4 Mod. 315; 3 Keb. 295; Salk. 319, pl. 3; Holt, 1, pl. 2; Carth. 236; Ld. Raym. 244; Comb. 441; 5 Mod. 338; Carth. 404; Show. 402. || 1 Maul. & S. 217. || (g) For this vide F. N. B. 166; 44 E. 3, 10.

The *sci. fa.* may either be (h) general against all terre-tenants, or against the terre-tenants naming them: but it is (i) said, that if a person undertakes to name them he must be sure to name them all.

2 Salk. 600, pl. 8; Ld. Raym. 669. || 2 Saund. 7, (4). || (h) Whether to be directed to all the executors generally, or to them by their names. 2 Bulst. 231. (i) Comb. 282.

(C) In what cases necessary. (*Husband and Wife*.)

β A *scire facias* against the heir is not requisite, when there was a judgment against his ancestor in his lifetime.

Baker v. Long, 1 Hayw. 1.g

To a *sci. fa.* against the heir and terre-tenants, the sheriff must return that they are tenants of all the lands *in ballivâ suâ*, and not that they are tenants of lands *in ballivâ suâ*.

2 Salk. 598, pl. 1.

{ A *scire facias* issued, on a judgment obtained against C, against A and B as terre-tenants of C deceased, which was returned by the sheriff that he had given notice to the tenants of the land of which C was seised, &c., to appear, &c. After a judgment by default, it was held that the terre-tenants were too late to move to set aside the *scire facias*, on the ground that the heirs and personal representatives of C had not been previously warned, or because they were not such terre-tenants as ought to have been summoned.

3 Johns. Rep. 86, *Whitney v. Camp*. }

β When a judgment creditor proceeds to enforce his lien on real estate, and it becomes necessary for that purpose to revive the judgment, he must make all the terre-tenants parties to the *scire facias*, in order that they may be compelled to contribute jointly to the payment and satisfaction of the debt.

Morton's Executors v. Terre-tenants of Croghan, 20 Johns. 106.

After judgment by default, the terre-tenants are too late to move to set aside the *scire facias* on the ground that the heirs and personal representatives of the deceased have not been warned.

Whitney v. Camp, 3 Johns. 86.

When the judgment is revived by *scire facias* against the original defendant, it is not necessary to make the terre-tenants parties.

Jackson ex dem. Sternberg v. Shaffer, 11 Johns. 513. See *Righter v. Rittenhouse*, 3 Rawle, 273.

A *scire facias* against an infant heir to charge lands may be served on a guardian appointed by the court *pro hoc vice*.

Anon., 2 Hayw. 94 ; S. C., *per nomen* *Gardner v. Ellis's Heirs*, 1 Tayl. 106.g

6. *By and against Husband and Wife.*

If a woman, executrix to J S, marries, and the husband and wife bring an action of debt upon an obligation in the right of the wife as executrix to J S against J D, and have judgment against him to recover the debt with damages and costs, and after the wife dies before execution sued, the husband shall not have a *sci. fa.* upon this judgment; for that he, though he was privy to the judgment, shall not have the thing recovered, but it belongs to the succeeding executor or administrator.

Oro. Car. 207, *Beaumont v. Long*, adjudged; though objected the judgment was for the costs and damages which belonged to the husband, though the debt did not, and therefore the *sci. fa.* should be maintained for the damages; but a *sci. fa.* being as well for the debt as damages, it was held not maintainable; and whether he might maintain a *sci. fa.* for the damages and costs, they would give no opinion. *Jon.* 248, S. C. adjudged, and said, this recovery does not turn it to the proper debt of the husband, as it would if the baron and feme recovered the proper debt of the feme.

But, if husband and wife obtain judgment in debt, and the wife dies, the

(C) In what Cases necessary. (*Husband and Wife.*)

husband, without taking out administration to her, may have a *sci. fa.*, for by the judgment it is become a debt to him:

Sid. 337; Cro. Eliz. 844; 3 Mod. 188; 2 Leon. 14; 4 Leon. 186.

If a woman obtains a judgment in debt and after marries, and the husband and wife sue out a *sci. fa.* and thereupon have an award of execution, though the wife dies, yet the husband (without taking out administration) may have execution upon the judgment, for the award upon the *sci. fa.* attached in the husband, and shall survive, though objected, the award on the *sci. fa.* made no alteration, because the execution must be on the first judgment.

Salk. 116, pl. 7, *Woodyer v. Gresham*, adjudged; Comb. 455, S. C., by which it appears the year expired before the *sci. fa.* taken out, and said by Holt, C. J., that the debt was attached to him jointly with his wife; so that although the award of execution did not alter the nature of the debt, yet it altered the property. Carth. 415; Skin. 682, pl. 2, S. C.

If a judgment in debt is obtained against a feme sole, who afterwards marries, and then a *sci. fa.* is thereupon brought against husband and wife, and after two *nilis* returned, judgment is given that the plaintiff shall have judgment against them, and the wife dies, the husband shall be liable to this execution.

Carth. 30; Salk. 116, pl. 7; 3 Mod. 186; Comb. 103; Skin. 682, pl. 2, *Obrien v. Ram*.

|| And if a woman marries after interlocutory judgment against her, the plaintiff may proceed to judgment and execution against her, without joining the husband by *scire facias*.

Cooper v. Hunchin, 4 East, 521; *Doe v. Butcher*, 3 Maul. & S. 557; and see *Tidd*, 1166, (8th ed.)||

β When a judgment is rendered in favour of several plaintiffs and one dies, if the survivor is a feme who afterwards takes a husband, she cannot have execution without a *scire facias*, and then her husband must join.

Berryhill v. Wills, 5 Bin. 56.g

[On a plea of coverture in an action of debt on a judgment, a verdict was found for the defendant, and a writ of *fieri facias* sued out for the costs, commanding the sheriff to levy and pay them to the defendant, and her husband. A rule was granted to show cause why the writ, and proceedings thereon, should not be set aside for irregularity, it being a maxim, that a person not a party to the record cannot be benefited, or charged by the process without a *scire facias*. The court were clearly of opinion, that the proceedings were irregular. And *Ashhurst, J.*, added, the wife might have had process in her own name, because, the plaintiff having declared against her as sole, he was concluded from denying it.

Wortley v. Rayner, Dougl. 637.) β In a *scire facias* against a married woman to recover a forfeiture for not attending as a witness, her husband must be joined with her. *Wallace v. Weir*, 1 Tenn. 312.g || See further as to *scire facias* on marriage, 2 Will. Saund. 72 k, l.||

β Where the plaintiff dies pending a suit, and the suit is revived by his administratrix, and before judgment she marries, and the fact is pleaded *puis darrein continuance*, by which the *scire facias* is abated, a new *scire facias* may issue in the name of the husband and wife, under the judiciary act of Congress of 1789.

McCoal v. Lekamp, 2 Wheat. 111. See *Hatch v. Eustis*, 1 Gall. 160.

Where a *feme sole* plaintiff, after a report of referees in her favour, mar-

(C) In what Cases necessary. (*Against Bail*.)

ried, and, without a *scire facias* having issued to make the husband party, a judgment was afterwards entered upon the report, and execution was issued, it was set aside for irregularity.

Johnson v. Parmele, 17 Johns. 271.g

7. Scire Facias against Bail.

|| For the law on this subject vide also tit. "*Bail in Civil Causes*."||

A *sci. fa.* is the usual and proper remedy against the bail when judgment hath been obtained against the principal, and no satisfaction made by him. This is founded on a record, to wit, the act of the court in admitting the party to bail, and the judgment against him. But it must appear that the party himself hath not satisfied the judgment; and hence it hath become a settled rule that there must be (a) a *capias* returned against the principal before *sci. fa.* is to issue against the bail.*

Moor, 432; Cro. Eliz. 597; Lev. 225; and vide tit. *Bail*, letter (D). (a) That it must be awarded within the year, else not till a *sci. fa.* against the principal. 2 Jon. 96.—Not necessary to recite it in the *sci. fa.* Cro. Ja. 97.—* And the course is, to get the sheriff to return *non est inventus* on the *ca. sa.*

If there is judgment against A to account, and manucaptors found by him to appear before auditors assigned, no *sci. fa.* lies against the manucaptors or bail without a certificate from the auditors to the court, that he hath not conformed; for the auditors are judges of the cause, and may excuse the non-appearance, and may appoint a shorter or longer day for the party to appear, as they think fit.

Stil. 105.

In a *sci. fa.* against bail they cannot plead that the principal died before the *sci. fa.* issued, (b) but they may plead, that the principal died (c) before the return of the *capias* against him: so, they may plead that the principal died before any judgment against him, because they cannot have a writ of error to reverse that judgment.

Cro. Ja. 163; Hutt. 47. (b) Cro. Ja. 97; Moor, 175; Poph. 186; Winch. 61; Stil. 324; 2 Mod. 28, 308. (c) But, if he dies after the return of the *capias*, this will not excuse the bail. Roll. Abr. 336; [Glyn v. Yates, 1 Stra. 511; 8 Mod. 31, S. C.; Barry v. Barry, 2 Stra. 717; 2 Ld. Raym. 1452, S. C.; Filewood v. Popplewell, 2 Wils. 67, S. P.]

If the principal surrenders himself, or the bail render him up, this will discharge the bail, and may be pleaded to the *sci. fa.*, but such surrender or render are not sufficient, unless the plaintiff or his attorney have notice of it. And this is required, that the plaintiff may, if he pleases, charge him in execution; also that he may not be at any further trouble or charge in proceeding against the bail.

Moor, 888; Leon. 58; 2 Buls. 260.

In a *sci. fa.* by the executor of the plaintiff, upon a judgment against the principal, the defendant pleaded that the testator sued execution by *sci. fa.* against the bail, and had judgment and execution awarded against them: it was held no plea, because not showed the plaintiff was satisfied by the execution against the bail; for otherwise, without satisfaction, he may always charge the bail.

Cro. Ja. 545, Freeman v. Freeman.

If one be bail for A, B, C, and D, and before the return of the second

(C) In what Cases necessary. (*Against Bail.*)

sci. fa. the plaintiff take A in execution, yet the bail are not discharged as to the other three, for they undertook to bring in all four.

1 Lev. 195; Vent. 315; 2 Mod. 312; 2 Jon. 75, *Astry v. Balard*.

[*Scire facias* against bail in error, on a judgment for damages, must be to show cause why plaintiff should not have execution of the *debt* aforesaid, (the specific sum in the recognisance,) not of the damages.

Barlow v. Evans, 2 Wils. 98.

If a *capias ad satisfaciendum* against the principal is left with the sheriff before the allowance of a writ of error, and appears afterwards to be returned *non est inventus*, it shall be presumed to be returned after the writ of error spent, and it is sufficient to found a *scire facias* against the bail.

Simmonds v. Middleton, 1 Wils. 269.

If the *scire facias* against the principal after judgment has only four days between the *teste* and return, and the *scire facias* is brought against the bail, proceedings shall be stayed, upon motion by the bail.

2 Mod. Ca. 305.

Where, after error brought by the principal, a *scire facias* was sued out against the bail, the court ordered the proceedings to be stopped, on the bail consenting, if the judgment were affirmed, to surrender the principal, or give judgment on the *sci. fa.*

Myer v. Arthur, 2 Stra. 419.

Where the writ of error by the principal was allowed before the time was expired within which the bail had indulgence to surrender the principal, though notice of such allowance was not given to the plaintiff's attorney until after the expiration of that time; the court of B. R. gave the bail the same terms as are usual where they apply within the time indulged to them for surrendering the principal.

Capron v. Archer, 1 Burr. 340.

On the return of the second *scire facias* against bail, a four-day rule was given, and on the fourth day the principal brought error, whereupon it was moved to stay proceedings against the bail pending the writ of error; and the above case of *Myer v. Arthur*, and *Church v. Throgmorton* in the House of Lords, were cited; in which last case the House threatened to commit the attorney, for proceeding against the bail pending error in parliament. As to the first case, the court said, it differed, for there the bail came in time, while they might surrender the principal; which they cannot do here, after the return of the second *scire facias*, at which time no writ of error was brought. And as to the case in the House of Lords, it was there agreed, that the court below could not restrain them; but the Lords said they expected more respect. We can make no rule.

Everett v. Gery, 1 Stra. 443; *Richardson v. Jelly*, 2 Stra. 1270. So, in *Aldridge v. Snowden*, 8 Mod. 130, the bail did not move till both *sci. fa.* were out and the rules upon them, and the court held they came too late.

The second *scire facias* was returnable the first day of the term, and a week within term the bail moved to stay the proceedings on the common terms of giving judgment in the *scire facias*, and taking four days to surrender after affirmance in the principal cause. But the court held they came too late, after their time to surrender was gone, and would not revive it again: all they would do was to stay the suing out of execution until after affirmance.

Cole v. Buckland, 2 Stra. 872.

(C) In what Cases necessary. (*Several Defendants.*)

It is immaterial whether the *ca. sa.* be actually returned, or such return actually filed, before the issuing of the *scire facias* against the bail; for if the bail should plead that no *ca. sa.* was returned and filed before the *teste* of the *scire facias*, such return may be filed at any time before putting in a replication to the plea.

Hunt v. Cox, 3 Burr. 1360.

If the first *scire facias* bears *teste* the same day with the *ca. sa.*, and the bail have rendered the principal after judgment, both writs of *scire facias* will be quashed.

Wilcox v. Prosser, Barnes, 95.

The court have refused to set aside a judgment actually signed against the bail, because error was pending by the principal.

Fisher v. Emerton, 1 Stra. 526; Humphreys v. Daniel, Barnes, 202, S. P. But Taswell v. Stone, 4 Burr. 2454; and Benwell v. Black, 3 Term Rep. 636, *contra*.]

{ The *scire facias* may be sued out against the bail on the day on which the *ca. sa.* is returnable, because the court will intend that it issued after the sheriff's return to the writ against the principal.

2 Ld. Raym. 1567; 2 Stra. 866, Stewart v. Smith; 8 Term, 628, Shivers v. Brooks. See 3 Johns. Rep. 514, Pearsall v. Lawrence. }

β A *scire facias* against bail who has removed from the state, is properly served by leaving a copy of it at the place of the last residence of the bail within the state.

The People v. Monroe, C. P. 3 Wend. 443.

Where an action was brought in a state court against a foreign consul, and it did not appear, either by the plaintiff's own showing, or on a plea to the jurisdiction of the court, that the defendant was a consul, and judgment was rendered on default; held, that on *scire facias* against the bail, he could not take advantage of the want of jurisdiction in the original action.

Hall v. Young, 3 Pick. 80.

8. *Scire Facias against several Defendants.*

A joint *scire facias* cannot be sustained against two defendants, who are separately fined for a contempt.

Thompson v. The State, 4 Blackf. 188.

Where a *scire facias* to revive a judgment issues against three, and only two are served with the writ, and it is admitted that the third is insolvent and has removed out of the state, the plaintiff may have execution against the two who have been served.

Binford v. Alston, 4 Dev. 351.

Where the judgment is against two or more, the *scire facias* must pursue the judgment, and be issued against all the defendants.

Grenell v. Sharp, 4 Whart. 344.

Where, after the rendition of the original judgment, one of the defendants dies, his personal representatives must be made parties to the *scire facias* to revive the judgment. It ought not to issue against the survivor alone.

McCabe v. The United States, 4 Whart. 325.

Judgment rendered against four, which is binding on their real estate, one dies, the *scire facias* may be issued against the survivor and the executors of the deceased, jointly. In such case notice must be given to the terre-tenants.

Commonwealth v. Mateer, 16 S. & R. 416.

(D) The Form of the Writ and Proceedings.

After the death of the defendant, a *scire facias* to revive the judgment cannot be issued against his heirs, devisees, or terre-tenants, without first warning his executors or administrators, or joining them in the *scire facias*.

Brown v. Webb, 1 Watts, 141; Rowland v. Harbaugh, 5 Watts, 365.g

(D) The Form of the Writ and Proceedings, and how far it must pursue the Nature of the original Action.

It is said that a *sci. fa.*, being a judicial writ, shall not abate for want of (a) form; and that therefore where the words (b) *si sibi viderit expedire* were left out in a *sci. fa.*, yet the writ was held sufficient.

Lucas, 270. β See Menard v. Marks, 1 Seam. 25; Marshall v. Maury, 1 Seam. 332; Crawford v. Beall's admin., 3 Bibb. 472; M'Mahen v. Knox, 4 Bibb. 450.g (a) *Sci. facias* for *scire facias* held naught. Sid. 406. β A *scire facias* must contain every thing requisite to make a good declaration. M'Vickar v. Ludlow's heirs, 2 Ohio, 246; Wolf v. Poundsford, 4 Ohio, 397; Union Bank of Georgetown v. Meigs' heirs, 5 Ohio, 512.g (b) 3 Keb. 190, cont. 2 Lutw. 1281.

β A *scire facias* on a recognisance against a surety for the appearance of his principal, must show the default of the latter.

The State v. Humphreys, 4 Blackf. 538.

The omission of the christian names of the plaintiff, or the names of the persons who compose a company, is fatal.

Day v. Cushman, 1 Seam. 475.g

Also it hath been agreed, that wherever an original was amendable, there a *sci. fa.* would be so too, and that a discontinuance herein by the demise of the king is aided by the statute 1 Ann. cap. 8.

6 Mod. 263; 10 Mod. 258, 354. [That is where a *scire facias* is an original writ, as where it is to repeal letters patent. 1 Stra. 43.]

If the bail sues an *audita querela*, and a *sci. fa.* thereupon, which recites the *audita querela* and the *capias* against the principal, and the return thereupon, which *capias* was awarded *tempore reginæ Eliz.*, and the *sci. fa.* is recited to be *per breve dominæ reginæ Angliæ vicecomiti nostro de S. direct.* which is to the sheriff of the king that now is, this is error by the common law, but is (c) now amendable.

Roll. Abr. 199, 797, Barns v. Woolrich. (c) By the 18 Eliz. c. 14, no judgment to be stayed or reversed after verdict for want of form in any judicial writ; for which vide Cro. Ja. 89, 162, 372; 2 Sid. 7, 12; Vent. 105. [That a *scire facias* is not amendable, but the proper way is for the plaintiff to move to quash it. See Hillier v. Frost, 1 Stra. 401; Gray v. Jefferton, 2 Stra. 1165.] ¶ In the K. B. the plaintiff must pay costs on quashing his own *sci. fa.* after the defendant has appeared thereto. 1 Barn. & A. 486. But in the C. B. the plaintiff may move to quash his *sci. fa.* without costs at any time before plea. Tidd's Pract. 1160, (7th edit.)||

But, where in ejectment, there was judgment for two messuages, and after a year a *sci. fa.* upon it recited a judgment of one messuage only; and a *nul tiel record* being pleaded, it was moved to amend it, it was denied; for the court held, that the writ was good, for aught appeared on the face of it, and that if there were a judgment for one messuage this would be a good writ to revive it; so being good in itself, though not apposite to this purpose, to amend would be to make a new writ, or to alter a good writ, and to fit it to another purpose; and to amend this writ would falsify the defendant's plea, which was good at the time when pleaded. But, if the fault had appeared in the very writ, it might be amended. And for his expedition the plaintiff took another writ, which

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the court held he might do without getting this quashed ; for if this writ abates, then it is not the same cause.

Mod. 263, 310, Williams v. Hoskins ; || Lord Raym. 1057, S. C.

So, in a *sci. fa.* on a judgment, where by mistake in the *sci. fa.* the plaintiff's name was put for the defendant's, Sir Rhadulphus for Jacobus ; it was moved to amend it, being the fault of the clerk, but denied *per cur.*, for the writ does not appear to us to be wrong, and there may be such a judgment, for aught we know.

Salk. 52, pl. 17, Vavasor v. Baile.

It is said that a *sci. fa.* is in nature of a bill in Chancery, and that the same certainty is not required therein as by the common law.

Latch, 112. β In an action of *scire facias* no declaration is requisite. Jackson v. Tamur, 18 Wend. 526.g

In a *sci. fa.* upon a judgment in the upper bench before Oliver Lord Protector of the Commonwealth of England, Scotland, and Ireland, and the dominions thereunto belonging, &c., the *sci. fa.* was *coram Olivero domino nuper protectore* only ; *nul tiel record* was pleaded ; and if this was a variance between the *sci. fa.* and the record, was the question. Twisden held it variant, in that there might have been another judgment *coram domino protectore* only ; and said, the act for confirmation of judicial proceedings confirms them, and makes them records only under that style. But the other judges held, that this was no material variance ; and that in a *sci. fa.* it was not necessary to set forth the style of the king at large.

Hil. 15 & 16 Car. 2, in B. R. ; Dually v. Lord Byron, Sid. 173 ; Keb. 648, S. C.

By the statute Westm. 2, 13 Ed. 1, stat. 1, cap. 45, there shall be no essoyn nor protection in a *sci. fa.*, but aid, age, and receipt, shall be granted ; for the words *solemnitates curiæ* are to be understood the solemn judicial proceedings of the court, but extend not to the right of the party to have his age, or to be received, or to have aid of another.

2 Inst. 470.

[In a *sci. fa.* on a judgment recovered by an executor, it is not necessary to state the death of the testator.

Morfoot v. Chivers, 1 Str. 631.]

A *sci. fa.* to revive a judgment against an executor mentioned first a day of appearance *coram nobis ubicunque*, but after gave a day to the party to appear *ad præd. diem apud Westm.*, and it was moved to amend it ; but the court said, that it being in the writ they could not do it of grace or favour, but would give day to show cause why it should not be amended *ex merito justitiæ* ; but the plaintiff for his expedition moved to quash it.

6 Mod. 68, Jevon v. Turner.

[After a writ of error brought on a judgment in C B, there was a *scire facias* tested 28 November, returnable *die Veneris proximo post octav. Sancti Hilarii ubicunque tunc fuerimus in Angliâ*, to show cause *quare executionem non haberet*, to which the defendant demurred. It was held, that such writs of *scire facias* were made returnable sometimes at a day certain, and sometimes on common days ; but that this writ returnable on a day certain *ubicunque &c.*, was bad, for it ought to be returnable on a common day, if it be *coram nobis ubicunque, &c.*

Manning v. Bois, 3 Salk. 320. Where it was objected to a writ of *scire facias*, grounded upon a judgment in an assize, which is an original, that it ought to have been

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returnable *ubicunque*, whereas it was returnable on a day certain, Holt, C. J., said, it is good one way or the other. *West v. Sutton*, 2 Ld. Raym. 853, 854.

A *scire facias* returnable *ubicunque tunc fuerit* generally, is good, without limiting it to England. But, if made returnable *ubicunque tunc fuerit in Magnâ Britannîâ*, it is bad.

Rex v. Hare and Mann, 1 Stra. 146.

If two *nihils* are returned on a *scire facias*, this amounts to a warning.

Yelv. 112; *βCumming v. Devises of Eden*, 1 Cowen, 70; *Thompson v. Johnston*, 1 Car. L. R. 491. The return of "not found" in Indiana, is similar to that of two *nihils*, and two returns of "not found" are equal to two *nihils*. *Kearns v. The State*, 4 Blackf. 188. When a judgment is rendered on the return of one *nihil* only, it may be either set aside or reversed on error, but cannot be reversed or corrected collaterally in another suit. *Heister v. Fortner*, 2 Binn. 40.*g*

There must be two *nihils* or a *scire feci* returned upon a *sci. fa.*, for two *nihils* amount to a garnishment.

Yelv. 88; and vide *Skin*. 633, * * where it is said to be the constant practice of B. R. to sue both the *scire facias's* at once, in regard that there ought to be a full time between the date of the second *scire facias* and the return of it. But by a rule of court, E. 5 G. 2, every *scire facias*, of which notice shall be given to the defendant or defendants named in such writ, shall be delivered to the sheriff to whom directed, or left at his office *four* days before the return of such writ *exclusive* of the day on which such writ is returnable.—By the same rule every *first* writ of *scire facias* on which a *nihil* shall be returned, shall be delivered to the sheriff, or left in his office *some time* before the return of such writ.—Also, every writ of *alias scire facias* shall be delivered to the sheriff, or left in his office *four* days *exclusive* before the return of such writ. Vide *Harrison's Practice of K. B.* 258. &c. * * [But note, this rule extends only to a *scire facias* against bail: a *scire facias* in error needs not lie in the office four days before the return of it. *Miller v. Yerraway*, 3 Burr. 1723; *Gross v. Nash*, 4 Burr. 2439. But, where it is against bail, it must lie the last four days before the return. *Forty v. Hermer*, 4 Term R. 583. In the case of *Obrian v. Frazier*, 1 Stra. 644, it is said, that if the *scire facias* lie four days in the office, that is all which is required; that the summons may be made at any time before the court is up on the day of the return. And so is *Hunt v. Coxe*, 3 Burr. 1360. But in *Poole v. Willis*, E. 16 G. 3 Term R. 758, n., proceedings in a *scire facias* against bail were set aside, because the sheriff had summoned the party on the return day after the rising of the court; and in *Webb v. Harvey*, 2 Term R. 757, they were set aside on the authority of that case, because the bail were summoned only an hour before the court rose on the return day.] [But there is a mistake in the report of the case of *Webb v. Harvey*, for, by the affidavits filed, it appeared that the bail were not summoned until after the rising of the court. 1 East, 88. And in *Clarke v. Bradshaw*, 1 East, 86, it was determined to be the settled practice, that if the bail be summoned any time before the rising of the court on the return day of the writ, it is sufficient.] ||Vide tit. *Bail in Civil Causes*; and *Tidd's Pract.* 1161—1163, (7th ed.)||

βThe proper way of making a return to *scire facias* is to say that the defendant has nothing in the officer's bailiwick by which he could be attached, not that the defendant is not an inhabitant of his bailiwick, and is not found within the same

Lee v. Chilton, 5 Munf. 407.*g*

It hath been adjudged, that in a *sci. fa.* it is sufficient that there be (a) fifteen days inclusive between the teste of the writ of the first *sci. fa.* and the return of the second.

Carth. 468; 2 *Salk.* 599, pl. 7; and vide 2 *Jon.* 228; *Cro. Eliz.* 738; ||2 *Black. R.* 922.|| (a) Where there were but fourteen days between the teste and return of the *sci. fa.*, the court held it aided by the statute 17 Car. 2, c. 8. *Lutw.* 26.

But, where two *sci. fa.* were taken out with the same teste, but different returns, the one returnable in *Quinden. Hill.*, and another *Crastin. Pur.*, though there were different returns and at convenient distances, yet be-

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cause they were actually taken out at one time, it was adjudged wrong; for thus the party would lose the benefit of two *sci. fa.* which the law gives him.

6 Mod. 86, *per cur.*

[If there be fifteen days between the teste of the first and the return of the second *scire facias* against bail, it is sufficient, without any regard to the number of days between the teste and return of each.

Elliot v. Smith, 2 Stra. 1139.

But, where there is only one *scire facias*, the sheriff returning *scire feci*, and the proceedings are by bill, four days exclusive between the teste and return are sufficient.(a)

Bell v. Jackson, 4 Term R. 663.] [(a) Sunday may be reckoned as one of the four days which must elapse between the return of the second writ and signing judgment. Combe v. Cuttall, 3 Bing. 162; *sed vide* 6 Maul. & S. 133; 11 East, 71.]

It is a general rule that the *sci. fa.* must pursue the first action; and therefore where an action of debt was brought in Cumberland, and judgment had by confession, and a *sci. fa.* brought thereon against the executor in Middlesex, this was held to be erroneous, though the confession was at Westminster, and that the *sci. fa.* ought to have been brought in Cumberland.

Cro. Ja. 331; Yelv. 218; Hob. 4, S. C., Wharton v. Sir Edward Musgrave. *SA scire facias* can only issue from the court having the record on which it is founded. Osgood v. Thurston, 23 Pick. 110; Boylan v. Anderson, 2 Penning. 529; Tindall v. Carr, 1 Harr. (N. J.) R. 94.*g*

On a recognisance taken in B. R., the *sci. fa.* must be brought in Middlesex, for the recognisances there are not obligatory by the caption, but by their being entered of record in the court. So it is of debt.

2 Salk. 600, pl. 10.

But on a recognisance in C. B., the *sci. fa.* may be laid in the county where the caption was, or in Middlesex where it is filed; for it is a record by the caption, and becomes immediately obligatory, and therefore may be brought there; and it is also filed at Westminster, in C. B., and there remains of record.

2 Salk. 600, pl. 10. But for this diversity *vide* Stil. 9; All. 12; Hob. 195.

[In C. B., where the caption is in another county, and enrolled in Middlesex, the *scire facias* may be in either county; but where the caption is in Middlesex the *scire facias* must be there.

Follett v. Trill, Barnes, 96; Pickering v. Thompson, Ibid. 207.]

SA scire facias quare executio non may be issued on a judgment in the common pleas, although the record has been removed by writ of error, if bail has not been given.

Boyer v. Rees, 4 Watts, 201.*g*

Also, though regularly the first *sci. fa.* upon a recognisance to have execution ought to be in the county where it was acknowledged; yet, if it be returned that he hath no lands there, that no heir can be found, or that the party is dead, a *testatum sci. fa.* may issue to any other county where the party surmiseth that there are lands.

Cro. Car. 313.

* It hath been resolved that a *sci. fa.*, on a recognisance of bail taken by

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commissioners in the county of York, may be brought in Middlesex or York, at the election of the party.

2 Lutw. 1287, *Redman v. Winford*.

[A *scire facias* sued out on a bail-piece remaining in Middlesex, must be sued out in Middlesex, though the original cause of action were in London.

Bond v. Isaac, 1 Burr, 409. {See 1 East, 603.}

A *scire facias* to revive a judgment in this case, is a continuance of the first suit. Hence, whatever engagements would be binding on the principal, will be so on his representatives. So, the proceedings on a *scire facias* against the bail shall be in the same court with those against the principal; and if the latter be carried back by *procedendo* to an inferior court, a *scire facias* afterwards removed thereout against the bail shall be likewise remanded. So, the costs of a *scire facias* after bankruptcy to revive a judgment recovered before the bankruptcy, relate back to the original judgment, and are recoverable under the commission.

1 Term R. 388; *Dixon v. Heslop*, 6 Term R. 366; *Phillips v. Brown*, 6 Term R. 232.

Where a *scire facias* is brought in B. R. upon a judgment in an inferior court, it must appear by the writ itself how the judgment came into B. R., whether by *certiorari*, or by writ of error, because the execution is different: for if it came by *certiorari*, the *scire facias* must set forth the limits of the inferior jurisdiction, and pray execution within those limits, and also that the judgment came in by *certiorari*. But, if it came in by writ of error, that must be shown likewise in the *scire facias* itself, and it must pray execution generally.

Guillam v. Hardisty, 3 Salk. 320; 1 Ld. Raym. 216, S. C.

It was moved to quash a *scire facias quare executionem non, &c.*, sued by the defendant in error to make the plaintiff assign his errors, because the original suit in C. B. was by bill of privilege, and the *scire facias* ought therefore to be returnable on a day certain, but this was made returnable upon a common return. And of that opinion was the court, because the *scire facias* ought to be made returnable according to the nature of the original suit below in C. B. And Trin. 11 Ann. between *Vavator* and *Parker*, it was adjudged so by the court of B. R. in the very same case. And the writ of error was quashed.

Eden v. Wills, 1 Ld. Raym. 141.

Where an executor pleads *plenè administravit*, and the plaintiff does not take issue upon it, but takes a judgment of assets, *quando aciderint*, the *scire facias* on that judgment must only pray execution of such assets as have come to the executor's hands since the former judgment; if it pray execution of assets generally, without confining it to that time, it cannot be supported, because it does not pursue the terms of the judgment, on which it is founded.

Mara v. Quin, 6 Term R. 1.

Upon the same principle a *scire facias* on a judgment against a person who has been twice a bankrupt, under the stat. 5 G. 2, c. 30, § 9, which says, "the future estate and effects of such person shall be liable to his creditors, *unless* the estate shall produce sufficient to pay 15s. in the

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pound," &c., is bad, if it do not aver, that the bankrupt's estate is || not || sufficient to produce 15s. in the pound.

Gill v. Scrivens, 7 Term R. 27.

|| Declaration in *scire facias* by plaintiffs as assignees of a bankrupt, on a judgment obtained by the bankrupt, stated that the plaintiffs were duly chosen assignees, and that "on behalf of A, B, &c., assignees as aforesaid, we have been informed, &c.;" but did not state that an assignment of the bankrupt's effects was made. Held good on general demurrer; for the court might presume that such assignment was made, though *come semble*, it would have been insufficient on special demurrer.

Fletcher v. Pogson, 3 Barn. & C. 193.||

If the defendant dies after a writ of inquiry executed, and before the return, and the *scire facias* is to show cause why a new writ of inquiry should not be awarded, it shall be quashed; for it should be, to show cause why the damages assessed should not be recovered.

Goldsworthy v. Southcott, 1 Wils. 243.]

If there be a judgment in debt against A and B, one *sci. fa.* will not lie thereon against the heir of B, and another against A, for the *sci. fa.* ought to pursue the judgment, and that being joint so ought the *sci. fa.* to be, for otherwise there would be several independent suits.

2 Salk. 598, pl. 1; Carth. 105, S. C.; and vide Skin. 82, pl. 24.

§ When judgment on a warrant of attorney was signed in November, 1827, and revived by *scire facias* in February, 1836, upon which judgment was also signed; held, that a subsequent *sci. fa.* to revive the original judgment, not reciting the original *sci. fa.* and judgment, was irregular, although the writ and return had never been returned, and that the defendant, although outlawed, was entitled to apply to set the proceedings aside.

Walker v. Thelluson, 1 Dowl. N. S. 578.

A *sci. fa.* upon a recognisance of bail taken in open court in K. B. is properly suable in Middlesex, where the record is, though all the previous proceedings, which commenced by original, were in London. And, *semble*, that it could not be sued elsewhere than in Middlesex.

Coxeter v. Burk, 5 East, 461.g

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A *sci. fa.*, whether considered as an original or judicial writ, is an action, and such as the defendant may (a) plead to; and therefore it is held, that a release of all actions, or all executions, is a good bar to a *sci. fa.* So, in a *sci. fa.* on a fine, a release of all actions is a good plea in bar.

Lit. § 506; Co. Lit. 291. (a) A man may plead in bar or abatement to a *sci. fa.* as well as to other actions. The plea in bar is always concluded by an *executio non*, as in other cases by an *actio non*. 10 Mod. 112; Yelv. 218. [But the *scire facias* being an action, the conclusion by an *actio non*, though somewhat informal, will yet not vitiate the plea. Grey v. Jones, 2 Wils. 251.]

§ A *scire facias* is considered both as process and declaration, and the proper course to take advantage of informalities, is, by demurrer, when a *scire facias* may be amended.

Marshall v. Murray, 1 Seam. 232. See Andress v. The State, 3 Blackf. 110; Lasselle v. Godfroy, 1 Blackf. 299.g

But the defendant cannot regularly, to a *sci. fa.* to have execution of a judgment, plead that which might have been pleaded to the original ac-

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tion; as, where A, as administrator to J S, by virtue of administration granted to him by the Archbishop of Canterbury, brought debt against B, and had judgment to recover, and after the year brought a *sci. fa.* on the judgment; the defendant pleaded that the intestate died in London, and had no *bono notabilia* in divers dioceses, and that after the judgment the Bishop of London committed administration to the wife; upon demurrer it was held, that this was a matter he could have pleaded before, and that it was annulling the record, which is not sufferable.

Cro. Eliz. 283, Allen v. Andrews. [So, Trail v. Edwards, 6 Mod. 308; Earl v. Hinton, 2 Stra. 732; Skelton v. Hawling, 1 Wils. 238; Wharton v. Richardson, 2 Stra. 1175; Ramsden v. Jackson, 1 Atk. 292; Erving v. Peters, 3 Term R. 685;] {1 Bay. 491, The State v. Gordon. See 1 Binn. 67, 68, Cramond v. Bank of the United States; Ibid. 289, Hartzell v. Reiss;} β M'Farland v. Irwin, 8 Johns. 77.g

So, where in a *sci. fa.* on a judgment the defendant pleaded the statute of usury, it was held no plea, because he should have pleaded it to the original action.

Rowe v. Bellaseys, 1 Sid. 182. [So, Middleton v. Hill, Cro. Eliz. 588; Bush v. Gower, Ca. temp. Hardw. 233; 2 Stra. 1043, S. C.; Cooke v. Jones, Cowp. 727. From the two last cases, it seems the court will try to relieve against the usury on motion.] {And see accordingly 1 Johns. Rep. 532, n., Wardell v. Eden; 3 Johns. Rep. 139, Starr v. Schuyler; Ibid. 142, King v. Shaw; Ibid. 250, Hewitt v. Fitch.} β When the original judgment is erroneous, a judgment on a *scire facias* cannot be supported. Mills v. Connor, 1 Blackf. 8.g

So, if a *sci. fa.* be brought on a judgment in assize for the office of marshal, the defendant cannot plead, that the plaintiff was an alien enemy, for this was pleadable to the assize; and as he admitted the plaintiff able to have judgment, he cannot now disable him from having execution.

Salk. 2, pl. 5; 2 Ld. Raym. 853, West v. Sutton.

β To a *scire facias* issued to revive a judgment, the only defence that can be made, is a denial of the original judgment altogether, or to show that it has been satisfied since its rendition.

Cardesa v. Humes, 5 Serg. & R. 68.

A payment which might have been pleaded in bar to an original *scire facias* to revive a judgment, cannot be pleaded or given in evidence on a second *scire facias*.

Wilson v. Hurst's executors, 1 Pet. C. C. R. 441.

To a *scire facias* to revive a judgment in ejectment for the term and damages, the defendant cannot plead a conveyance of the premises to another, by the lessor of the plaintiff, subsequent to the judgment.

Penn v. Kline, 1 Pet. C. C. R. 446.g

But a diversity is held between a *sci. fa.* upon a judgment in debt and in ejectment, and that in the last, a stranger may controvert the original title, but those that claim under the judgment are estopped and bound by it.

Salk. 600; 12 Mod. 499. β In a *scire facias* brought to obtain an execution on a former judgment in ejectment, the defendant cannot controvert the title determined by such judgment. Bradford v. Bradford, 5 Conn. 127.g

In a writ of annuity for an annuity granted to a seneschal for holding courts, there was judgment for the annuitant, who brought a *sci. fa.* for arrearages incurred *after* the judgment; to which the defendant pleaded, that the seneschal, though often requested, refused to hold any court, and this was held a good plea.

Dyer, 377 a.

(E) Pleadings to a *Sci. Fa.*

The sheriff levied the debt on the defendant's goods, but did not return the writ; whereupon the plaintiff brought a *sci. fa.* against the defendant to show cause why he should not have execution on the same judgment; to which the defendant pleaded, that the sheriff had levied the debt on his goods, &c., and this was held a good plea.

Golds. 170, *Foe v. Bolton*, vide tit. *Execution*, vol. 3. || But such plea is bad unless it allege that the sheriff returned the writ. 4 Moo. 163.||

But, where to a *sci. fa.* on a judgment the defendant pleaded, that the sheriff had levied part upon a *fi. fa.*, and that after it was agreed between the plaintiff and defendant, that the defendant should pay the under-sheriff 10*l.* in full satisfaction for the residue, and that he paid it accordingly; on demurrer, the plea was held insufficient, payment being no plea in debt upon a bill obligatory; *à fortiori*, not in debt upon a judgment of record.

3 Lev. 119, *Kettleby v. Hales*.

But now by the 4 & 5 Ann. c. 16, § 12, it is enacted, "That where an action of debt shall be brought upon any single bill, or where debt or *sci. fa.* shall be brought on any judgment, if the defendant hath paid the money, such payment may be pleaded in bar."

It seems agreed, that a general non-tenure is not a good plea to a *sci. fa.* upon a judgment in a personal action, because it falsifies the sheriff's return; but that in a *sci. fa.* to have execution of a judgment in a real action, one may plead non-tenure against the return of the sheriff, because of the high regard the law has to the freehold.

2 Roll. Rep. 54; *Cro. Eliz.* 872; 6 Mod. 134, 226; 2 *Ld. Raym.* 854; *Salk.* 40, pl. 9; 2 *Salk.* 679, pl. 7.

But a special non-tenure may be pleaded to a *sci. fa.* upon a judgment in a personal action; as to a *sci. fa.* on a judgment for debt or damages against tenant for years, he may plead that he has only a term for years. *Owen*, 134; 3 Lev. 205.

If one joint-tenant is returned, he may plead that another is tenant of a moiety.

2 Roll. Rep. 54, vide *suprà*.

|| On a *scire facias* on judgment, defendant having leave to plead several matters, pleaded, 1st, payment; 2d, that the judgment was fraudulent; 3d, that the judgment was on a warrant of attorney fraudulently obtained. The court of C. P. refused to allow the three pleas, and put the defendant to his election.

Shaw v. Alvanley, 2 Bing. 325.||

[If to a *scire facias* against bail they plead, that the principal died before the return of any *ca. sa.*, a replication stating a particular *ca. sa.*, and that the plaintiff was alive at the return of that *ca. sa.*, must conclude with an averment; for the *ca. sa.* in the replication is new matter; and by the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it.

Henderson v. Withy, 2 Term R. 576. So *Pilewood v. Popplewell*, 2 Wils. 65; *Chandler v. Roberts*, Dougl. 58.

♣ To a *scire facias* issued to revive a judgment rendered by default, the defendant may plead specially, for the protection of his person, a discharge as an insolvent debtor obtained on the same day that the judgment by default was rendered against him.

Lloyd v. Ford, 7 Halst. 151.

(E) Pleadings to a *Sci. Fa.*

To *scire facias* for the purpose of reviving a judgment, if the defendant plead he was formerly imprisoned for the same debt, the plea is bad for want of showing how he was discharged.

Ballard v. Averitt, 2 Hayw. 17; S. C. Tayl. 69.

To a *scire facias* against bail it was pleaded, that the principal had been taken on a *ca. sa.* and had availed himself of the act of 1820, for the relief of honest debtors, and had been discharged; the plea was holden bad on general demurrer, because it did not show the court's jurisdiction in the discharge, nor did it show that it was during the continuance of the act of 1820, nor did it specify distinctly the kind of discharge relied on, which under a *ca. sa.* might have been in two modes; and because it did not show that the creditor had notice.

Langley v. Lane, 3 Hawks, 313.

Scire facias to revive judgment, defendant pleads that he was formerly imprisoned for the same debt, the plea was holden to be defective because it did not show how the defendant was discharged.

Ballard v. Averitt, 2 Hayw. 17; S. C. 1 Tayl. 69.g

Judgment on a *scire facias* cannot give damages for delay of execution; but if it does, it may be reversed for that, and affirmed *pro residuo*. But, when the jury found that plaintiff was *damnified, and put to costs to 6d.*, it was holden to be well enough; for it is only meant as a foundation for the costs *de'incremento*. Damages may mean costs.

Henriques v. Dutch West India Company, 2 Str. 807; 2 Ld. Raym. 1532; Knox v. Costello, 3 Burr. 1789. β Judgment may be given on a *scire facias* for the amount of the original judgment with interest to the date of the judgment on the *scire facias*. Berryhill v. Wills, 5 Binn. 56.g

β In an action of *scire facias*, the plaintiff filed no declaration, and the defendant demurred to the writ of *scire facias*. Held, that the legal effect was the same as if the demurrer had been to a declaration, and the same judgment was entered.

People of Vermont v. The Society for the Propagation of the Gospel, Paine's R. 652. See Jackson v. Tamur, 18 Wend. 526.

On a *scire facias*, an order of court awarding execution on a former judgment, is a judgment rendered on such *scire facias*.

Ensworth v. Devenport, 9 Conn. 390.

Judgment on *scire facias* must be that execution on the original judgment, to which nothing can be added.

Walton v. Vanderhoof, 1 Penning. 73; Boylan v. Anderson, 2 Penning. 529; Tindall v. Carson, 1 Harr. (N. J.) 94. But see 5 Binn. 56.g

As no damages are recoverable in a suit upon a *scire facias*, so no costs were recoverable therein previously to the statute of 8 & 9 W. 3, c. 11, the third section of which enacts, "That in all suits upon any writ or writs of *scire facias*, the plaintiff, obtaining judgment, or any award of execution, after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit.*"

It has been adjudged, that this action does not extend to executors or administrators; therefore, if the plaintiff or defendant in this action sue or be sued in that capacity, he is not liable to costs.

Bellew v. Aylmer, 1 Str. 188; Smith v. Harmer, 1 Lill. Pr. Reg. 475, G.

SEQUESTRATION.

(A) The Nature and first Introduction of such Process.

Neither are any costs payable, where a writ of *scire facias* is quashed before plea pleaded, or abated by plea. As where, upon a motion by the plaintiff to quash his own *scire facias*, the defendant insisted upon costs, alleging, that he had entered an appearance, and thereby incurred expense; it was determined, that costs were never due in proceedings on a *scire facias* until a declaration was delivered, and the defendant had pleaded.

Huer v. Whitebread, Cas. Pr. C. P. 74; Pr. Reg. 378, S. C.; Pool v. Broadfield, Cas. Pr. C. P. 209; Pr. Reg. 378.

So, the plaintiff moved for leave to quash a writ of *scire facias*, the defendant having pleaded thereto in abatement, which was granted without costs. And by the court: It is the same in a *scire facias* as in an action where you plead in abatement, and the plaintiff's writ is abated, he pays no costs. But, they added, that if there had been no plea in abatement, and the party had moved to quash his own writ, they would have made him pay costs.

Pocklington v. Peck, C. P. 1 Stra. 638.] || But the court of K. B. has decided that the plaintiff must pay costs on quashing his *sci. fa.* after the defendant has appeared. Pickman v. Robson, 1 Barn. & A. 486.||

β The rule for quashing *sci. fa.* at the plaintiff's instance, is only *nisi* in the first instance; he is liable for costs of quashing the writ, but not for those of entering the *cassetur breve*.

Oliverson v. Latour, 7 Dowl. 605. See Ade v. Stubbs, 4 Dowl. P. C. 282; 1 Har. & Wol. 520.g

||As to the *scire facias* on bonds, pursuant to the 33 H. 8, c. 39, and *scire facias* to have execution for crown debts, see Tidd's Prac. 1140, (8th ed.)||

SEQUESTRATION.

(A) The Nature and first Introduction of such Process.

(B) In what cases to be awarded: and herein,

1. *Against what Persons.*

2. *To what Places.*

3. *What Estate or Interest shall be liable to a Sequestration, and from what Time.*

(C) Of the Power and Duty of the Sequestrators.

(D) Sequestration, when determined.

(A) The Nature and first Introduction of such Process.

A SEQUESTRATION out of Chancery is grounded on the return of the (a) serjeant at arms, wherein it is certified that the defendant hath secreted himself; and therefore this process issues, and giveth authority and power

(A) The Nature and first Introduction of such Process.

to the sequestrators (who are persons of the plaintiff's own naming) to enter upon and seize his, the defendants, real and personal estate.

(a) There must be a serjeant at arms after the return of the commission of rebellion before a sequestration can issue; and the reason hereof is, that the court will not issue process upon the whole lands and goods of the defendant, till one of its own officers see that the defendant do totally disappear. Gilb. Hist. Ch. 77: [1 Hen. & Mun. 310, Hook v. Ross.] Vide Preced. Chan. 549, &c. *β* See also 1 Harr. Chan. 191; Newl. Ch. Pr. 18; Blake's Ch. Pr. 103.*g*

It appears that there were great struggles between the common law courts and courts of equity before this process came to be established. The former held that a court of conscience could only give remedy *in personam*, and not *in rem* (a); that sequestrators were trespassers, against whom an action lay; and in the case of (b) Colston v. Gardner, the Chancellor cites a case, where they ruled, that if a man killed a sequestrator in the execution of such process, it was no murder.

Gilb. Hist. ch. 78; Cro. Eliz. 651, Brograve v. Watts. (a) Mod. 259. But 2 Mod. 258, that the Chancellor having issued such sequestration, it will be as binding as any other process, according to the rules of the common law. || On the 19th of November, 1670, the House of Lords ordered a reference to the Committee of Privileges, to consider of the proceedings in Chancery, on sequestration of estates, and what law there was to warrant such proceedings. See the Report, and the opinions of the judges, 3 Swanst. 309, *notâ*. || (b) 2 Chan. Ca. 44.

But these were such bloody and desperate resolutions, and so much against common justice and honesty, which requires that the decrees of this court, which preserve men from deceit, should not be rendered illusory, that they could not long stand; but this process got the better of these resolutions on these grounds: 1st, That the extraordinary jurisdiction might punish contempts by the loss of estate as well as imprisonment of the person, because that liberty being a greater benefit than property, if they had a power to commit the person, they might take from him his estate, till he had answered his contempts. 2dly, To say that a court should have power to decree about things, and yet should have no jurisdiction *in rem*, is a perfect solecism in the constitution of the court itself.

Gilb. Hist. ch. 78; 2 P. Wms. 621; 2 Chan. Ca. 44.

It has been said that the first instance of a sequestration after a decree was Sir Thomas Reed's case in Lord Coventry's time, and that it was afterwards awarded in chancery in the case of Hyde v. Pettit, 1666, and affirmed in parliament,(c) and by the Court of Exchequer, Gnavas v. Fountain, 1687, and since without scruple. The doubt formerly was, that lands were not liable to execution before the statute Westm. 2, 13 Ed. 1, st. 1, c. 18.

Chan. Ca. 92; 2 Chan. Ca. 44. || North's Life of Lord Guildford, v. ii. p. 73. (c) See the Decree, Lords' Journals, xiii. 147; 3 Swanst. 297. ||

In Vernon's reports it is said, that sequestrations were first introduced in Lord Bacon's time, and then but sparingly used in process, and after a decree to sequester the thing in demand only.

Vern. 421.

[It is now, however, become the common process in courts of equity, and may be said to be twofold; that is, it issues either as mesne process on the defendant's default in not appearing, or not answering, after the whole process of contempt hath spent against him; or, it issues as a judicial process in pursuance of a decree, and to enforce the performance

(A) The Nature and first Introduction of such Process.

of it ; and it is the execution and life of a court of equity ; and as it is the fruit of a long suit it is to be favoured, and in this case it is said to be analogous to an execution at common law.

1 Fowl. Exch. Pr. 170 ; 1 P. Wms. 308.

The order for the sequestration after a decree is, in the first instance, only *nisi*.

3 Br. Ch. Rep. 373.

{So of a sequestration for want of an answer.

11 Ves. J. 43, Bernal v. The Marquis of Donegal.}

A sequestration shall not be granted upon petition (a) nor without oath. (b) (a) Rules and Orders of Chancery, 123. (b) Harris, Ch. Pr. 261, but *qu.* the reference? In the case of Eyre v. Countess of Shaftesbury, 2 P. Wms. 110, a sequestration was ordered by Lord Macclesfield against the Countess of Shaftesbury and Gainsborough, for a contempt in marrying an infant, who was under the protection of the court. But upon this matter being brought before the Lords Commissioners, after the removal of Lord Macclesfield, it was observed by Lord Commissioner Gilbert, that this contempt was *not sworn* upon the Lady Gainsborough ; whereas an order for sequestration in the case of a peer, or a commitment in the case of a common person, is a judicial act of the court, and therefore must be founded upon a proper affidavit, as he apprehended. The order is the judgment of the court, the sequestration or commitment is but the execution of it. The judgment therefore is to be founded upon truth, and not upon a conjecture only. For, if she be examined upon interrogatories, this will not make good the determination of the court by a matter *ex post facto*. Gilb. Eq. Rep. 178. β A sequestration will not be granted upon an unsupported allegation that the defendant is wasting his effects. Spiller v. Spiller, 1 Hayw. 482.g

There cannot be separate sequestrations for debt and costs.

Graves v. Fennell, 1 Irish Eq. Rep. 28.

Upon affidavit of opposition to sequestrators, the Court of Exchequer will issue a writ of assistance.

Granslade v. Baker, Bunb. 168.

It was once a question whether the Court of Exchequer could grant a sequestration after a decree for a personal duty ? It was admitted, that in process for appearance a sequestration was always grantable by that court, but for a personal duty after a decree there were many instances in my Lord C. B. Hale's time, and in the Lord Montague's time, where it had been denied, and the precedents that had been produced for it were most of them where it was the suit of the king ; and it was admitted on all hands that where the king was plaintiff it might be granted. But by the opinion of Fenner, Heath, and Powell, Barons, it ought to be granted ; for they thought, that if it might be granted in mesne process, where it did not appear whether there was any duty or not, *à fortiori* after a decree where the duty was adjudged and ascertained. And it being always the practice of the Chancery, it ought much more in this court, where the plaintiff was supposed to be a debtor to the king. And they thought that the jurisdiction of the court of equity would be to little purpose if the court had not sufficient authority to see their decrees executed.—The Lord Chief Baron doubted because the Lord Chief Baron Hale could never be prevailed with to grant it, nor the Lord Montague, to whose learning, he said, he must greatly subscribe.—But by the opinion of the other three it was granted.

Gnavas v. Fountain, 2 Freem. 99.]

β It must appear that the party cannot be arrested, before permission to execute a sequestration can be given.

Mellifant v. Whitney, 1 Hayes & J. 219.

(B) When to be awarded. (*Against whom.*)

An attachment against the defendant for the non-payment of money, and sequestration against the defendant's property for the same cause, both may be kept up; the court allowing a double execution subject to its discretion.

Crone v. O'Dell, 2 Moll. 344.

Upon a decree for dower, there can be no sequestration of two-thirds to satisfy the claim for rents and profits of the dower.

H. K. Chase's case, 1 Bland, 372.*g*

(B) In what Cases to be awarded: And herein,

1. *Against what Persons.*

A SEQUESTRATION *nisi* is the first process against a peer or member of the House of Commons.

2 P. Wms. 385.—A sequestration granted against an infant peer. 2 Chan. Ca. 163.—That formerly an attachment lay. Comb. 62.—That it must be founded upon a proper affidavit, being a judicial act of the court. Gilb. Eq. Rep. 178. ¶ *Quære*, whether it is regular to issue a sequestration against the property of a party who is in the Fleet, under process from the Common Pleas, and is detained also under an attachment from Chancery, but who has not been brought up by *habeas corpus* to the bar of the court, in order to be turned over to the warden. *Const v. Barr*, 2 Russell's R. 161. The irregularity of a sequestration is waived, if the party against whom it is issued gives the sequestrators directions how to deal with his property. *Ibid.*; and see S. C., 2 Sim. & Stu. 452.¶

A sequestration is also the first process against a menial servant of a peer, within the words and meaning of the statute 12 & 13 W. 3, c. 3, for that otherwise such servant would have greater privilege than his lord.

2 P. Wms. 535. [Vide Stat. 10 G. 3, c. 50.]

If there be a sequestration *nisi* against a peer for want of an answer, and the peer put in an answer, that is insufficient, yet the order for a sequestration shall not be absolute, but a new sequestration *nisi*.

2 P. Wms. 385.

[If before a sequestration is awarded, the defendant shall have conveyed his land by coven, the sequestration shall be awarded against the defendant and his assigns, and the person to whom the land is assigned may be taken upon the sequestration.

2 Ch. Ca. 44.]

§ A lyceum, incorporated "for the promotion of intellectual and moral improvement," with power to have a cabinet of natural history, library, &c., and the whole to be devoted to literature, science, and the arts, is not a corporation subject to sequestration under the statute relating to proceedings against corporations in equity.

In the Matter of the Brooklyn Lyceum, 3 Edw. 392.

A sequestration may be issued against a defendant who is in contempt for not putting in an examination to interrogatories before the Master.

Lubton v. Hescott, 1 Sim. & Stu. 274.

A sequestration is the proper remedy when the defendant obstinately lies in prison to save his estate, or exhausts it in paying other creditors to the injury of the plaintiff.

Ross v. Colville, 3 Call, 382.

When the defendant is about to remove, in order to avoid a decree which he expects to be made against him, a sequestration may be issued.

Anonym. 1 Hayw. 347.*g*

(B) When to be awarded. (*What property liable.*)2. *To what Places.*

Notwithstanding the superintendent power of the court^{ts} in this kingdom over those in Ireland, and what is said in some of our books, it seems to be now the better opinion, that the Court of Chancery here cannot award a sequestration against lands in Ireland.

Vern. 76; 2 Chan. Ca. 189; 2 P. Wms. 261.

It was said that such process had been awarded to the Governor of North Carolina; but herein it was doubted, whether such sequestration should not be directed by the king in council, where alone an appeal lies from the decrees in the plantations.

2 P. Wms. 261.

[Where a defendant is out of the reach of the court, and cannot be made to appear, it amounts to the same thing as if the plaintiff had taken out process for want of an appearance, and carried it through the whole line of process to a sequestration. And therefore where a bill for an account is filed against two partners, one of whom is out of the kingdom, the court will decree an account to be taken, and that the whole which appears to be due shall be paid by the defendant partner, who is brought to a hearing.

Darwent v. Walton, 2 Atk. 510.]

3. *What Estate or Interest shall be liable to a Sequestration, and from what Time.*

Copyholds may be sequestered, though not extendible at common law or the statute of Westm. 2, (13 Ed. st. 1,) for courts of equity have *potes-tatem extraordin' et absolutam*. But it seems a doubt whether such a sequestration can be revived against the heir of the copyholder, for if it should, the heir would possibly not take up those lands; and then the lord would be without a tenant.

2 Chan. Ca. 46. Vide 1 Bern. 431. || See Coulston v. Gardiner, 3 Swanst. 282; Marquis of Carmarthen v. Hawson, Ibid. 294.||

[Where lands of the husband, out of which an annuity to the wife issued, were sequestered, the husband dying, the sequestration was discharged as to the annuity.

1 Ch. R. 247.

If a prebendary has a distinct corpse, or estate incident to his prebend, it may be sequestered: but, where he is only a member of the body aggregate, and the inheritance is in the dean and chapter, there cannot be a sequestration.

Mosely v. Warburton, 1 Salk. 320.

A sequestration out of Chancery is more effectual than an execution by *fi. fa.* at law; for, a sequestration may be against the goods, though the party is in custody upon the attachment; whereas at law, if a *capias ad satisfaciendum* is executed, there can be no *fi. fa.* issued.

Ca. Talb. 222.

[But no sequestration lies until the time for the return of the attachment, upon which the body was taken, is out.

Martin v. Kerridge, 3 P. Wms. 240.]

|| Choses in action, as stock, debts, &c., it seems, cannot be sequestered. But a pension granted to a party and his assigns is not a chose in action but a grant, and sequestrators may receive it; it is distinguishable from an officer's half-pay, which, on principles of public policy, is not assignable; and

(B) When to be awarded. (*What Property liable.*)

a party holding money claimed by the person against whom the sequestration issued, and also by a stranger, was ordered to pay the sum into court.

Dundas v. Dutens, 1 Ves. jun. 196; Simmonds v. Kinnaird, 4 Ves. 735; Macarthy v. Goold, 1 Ball. & B. 387; Franklin v. Colhoun, 3 Swanst. 276; and see Johnson v. Chippindall, 2 Sim. R. 55.||

β Choses in action are subject to the process of sequestration. In a clear case, a sequestration may be made effective in respect of choses in action by an order only, or a voluntary payment may be protected; in other cases, it may be necessary to resort to an action or suit under the direction of the court.

Wilson v. Metcalfe, 1 Beav. 263.g

Where the sequestrators seize the real estate of the party, any tenant or other person who claims title to the estate so sequestered, either by mortgage, judgment, lease, or otherwise, who hath a title paramount to the sequestration, shall not be obliged to bring a bill to contest such title, but he shall be let in to contest it in a summary way.

||Vide Walker v. Bell, 2 Madd. 21.|| {And this is the only way in which the party can claim, though by an adverse title. It is a contempt of the court to disturb sequestrators by bringing an ejectment against them without leave. 9 Ves. J. 336, 338, Angel v. Smith.}

He may move by his counsel as of course to be examined *pro interesse suo*; and in this case the plaintiff is to exhibit interrogatories in order to examine him for a discovery of his title to the estate, and he must be examined upon such interrogatories accordingly; and the Master must state the matter to the court, and the parties may enter into proof touching the title to the estate in question; and when the Master hath stated the whole matter, the court proceeds to give judgment therein upon the report; and if it appears that the party who is examined *pro interesse suo* hath a plain title to the estate, and is not affected with the sequestration, then it is to be discharged as against him with or without costs, as the court shall determine upon the circumstances of the case, and so *vice versa*.

Gilb. Hist. ch. 80; 1 Ves. 180. ||There can be no examination *pro interesse suo* till the sequestrators have made the return. Pelham v. Duchess of Newcastle, 3 Swanst. 290, note. The Master cannot inquire without an order. Ibid. 311. The examination is conclusive if not replied to. Ibid. An order for leave to exhibit interrogatories, to falsify the examination *pro interesse suo*, is obtained by a motion of course. Ibid. 308.|| Vide Cum. Rep. 712; 1 P. Wms. 308.

[A person claiming title to goods seized under a sequestration, obtained an order, that the party prosecuting the sequestration might exhibit interrogatories against him, to examine him *pro interesse suo*, and in the mean time that the goods might be restored to him on his giving security.

Martin v. Willis, May 10, 1745, in *Scacc.*; 1 Fowl. Excheq. Pr. 188. N. B. This order was directed to be by the court similar to that in Mackenzie v. The Marquis of Powis, 6th July, 1739, which was settled by the court; ||and vide 2 Ball. & B. 66.||

Papers had been delivered out several years, for the purpose of being examined, and an order had been made, that they should be restored. Application had been made for the return, and refused. The order had been served personally, but no writ of execution of the order had been served or sued out. It was moved for a sequestration *nisi*, and the rule was granted as of course.

2 Br. Ch. R. 434.]

The sequestration binds from the time of awarding the commission
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and not from the time of executing it and its being laid on by the commissioners only ; for if that should be admitted, then the inferior officer would have *ligandi et non ligandi potestatem*.

Vern. 58. || See Crofts v. Oldfield, 3 Swanst. 278. || {See 4 East, 523, 537, Payne v. Drewe.}

|| And the sequestration is not affected by the statute of frauds, and therefore is like an execution at common law, which bound from the *teste*.

Payne v. Drewe, 4 East, 523.

But if the party at whose prayer the sequestration issues take no measure to compel its execution in due time, and the sequestrators never in fact possess themselves of the goods, the party issuing it loses the advantage of it by his laches. And if a *fi. fa.* against the goods of the defendant in Chancery is delivered to the sheriff after the sequestration has been suffered to remain dormant for a considerable time (as eighteen months) without being laid on, and the sheriff on seizing under the *fi. fa.* is informed of the sequestration, still he is bound to levy ; and if he returns *nulla bona*, he is liable to an action for a false return.

The doctrine of this case appears confirmed by a case in Chancery decided at the same period. Angel v. Smith, 9 Ves. 336.

When the sequestrator, however, is in *possession*, he cannot be disturbed without leave of the court.

9 Ves. 336 ; Brooks v. Greathed, 1 Ja. & W. 178. ||

(C) Of the Power and Duty of the Sequestrators.

THE sequestrators are officers of the court, and as such are amenable to the court, and are to act from time to time in the execution of their office as the court shall direct. They are to account for what comes to their hands, and are to bring the money into court as the court shall direct, to be put out at interest or otherwise, as shall be found necessary. But this money is not usually paid to the plaintiff, but is to remain in court till the defendant hath appeared or answered and cleared his contempt, and then whatsoever hath been seized shall be accounted for and paid over to him. However, the court have the whole under their power, and may do therein as they please, and as shall be most agreeable to the justice and equity of the case.

The plaintiff's counsel may move and obtain an order for the tenants to attorn and pay their rents to the sequestrators, or for the sequestrators to sell {} and dispose of the goods of the party, and to keep the money in their hands, or to bring it into court, as shall be most advisable and discretionary, and fitting for the court to do.

{ } See 9 Ves. J. 208, Mitchell v. Draper. }

[A sequestrator is not entitled to any stated fee ; nor can he call upon the plaintiff for any fee, before he has made a return of what he has seized under the sequestration.

Wood v. Freeman, 2 Atk. 542 ; Hawkins v. Crook, 3 Atk. 594.]

Sequestrators on mesne process are accountable for all the profits, and can retain only so far as to satisfy for contempt.

Vern. 248.

If sequestrators, having power to sell timber, dispose of 7000*l.* worth, and only bring 2000*l.* to account, they, as officers and agents of the court, are responsible, and not the plaintiff.

Vern. 161.

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A sequestration is in nature of a *levari* at common law, and the party sequestering has neither *jus ad rem vel in re*; the legal estate of the premises remaining in every respect as before.

1 P. Wms. 307.

Sequestrators being in possession of a great house in St. James's Square, which was the defendant's for life, the court ordered that the Master allow a tenant for the house, and the sequestrators to make a lease, and the tenant to enjoy it.

3 Ch. Rep. 87.

|| Where A was tenant of premises under a lease from B, and a sequestration issued against B, and A signed an attornment agreeing to hold as tenant to the sequestrators: it was held, in an action for use and occupation brought by the sequestrators against A, first, that this instrument required an agreement stamp; and second, that A, not having received possession from the sequestrators, might dispute their title; (a) and that the lease not being proved to be surrendered, was an answer to the action. And as the sequestrators had no *legal* title to the rent, *qu.* whether they could have maintained the action independently of the lease? (b)

Cornish v. Searrell, 8 Barn. & C. 471. (a) See 6 Taunt. 202; 1 Bing. 38. (b) Sequestrators on mesne process will not be ordered by the Court of Chancery to make leases. 3 Swanst. 306, note; but *aliter* under a sequestration for non-payment of money. Ibid. 304.

It was moved, that the irregularity of a sequestration might be referred to the deputy, which was taken out against the defendant for not appearing, by reason of its being taken out sooner than by the course of the court it could, and yet the sequestrators had taken the goods off the premises, and threatened to sell them: the Chief Baron said, that as to the carrying the goods off the premises, it was clear the sequestrators could do that, because a sequestration upon mesne process answers to a *distringas* at law. But however, as to the selling them, the court agreed to the present case it could not be lawful, and said it had lately been settled on debate; and observed further, that courts of equity could not authorize sequestrators to sell goods even upon a decree until Lord Stamford's act, which makes decrees in this respect equivalent to a judgment. And even now, the counsel said, sequestrators cannot sell but by leave of the court: however, the court said, this was a matter proper for them to consider upon another occasion, and therefore only referred the irregularity of the sequestration as to the point of time to the deputy.

Desbrough v. Crombie, Barnard. Rep. 212, in *Scacc.* [This case is also reported by Bunbury, page 272, under the name of Desbrow v. Crommie, but the statement of facts, as well as the language of the court, is different. It is as follows:—A sequestration issued against the defendant *for want of an answer*; the sequestrators entered the defendant's house, and removed all the goods to the value of seventy pounds at least, though the thing in demand by the bill was little more. It was moved to have restitution of the goods, in regard the removal of them was not in the power of the sequestrators without a particular order of the court for that purpose. And *per curiam*,—There is a difference between a sequestration for want of an appearance, and for want of an answer. Even in the first case, it is to be looked upon as a *distringas in infinitum* at law; and the distress *there* ought to be only at first nothing, then increasing by degrees,* as the court directs, in order to compel an appearance: so the sequestrators ought in the first case, after seizure of some goods,

* [A distress, where there is *nothing* seized, and a *gradual increase* of that *nothing*, should appear to common understandings rather extraordinary.]

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to apply to the court for further directions for seizure, in order to compel an appearance. But, in the second case, the sequestrators have no power to remove any goods, much less to sell; for the goods are only to be retained in nature of a pledge to answer the contempt; and the plaintiff receives no injury by this, for he may set down his cause, and his bill may be taken *pro confesso*. And in this case the sequestrators had a day given to show cause why an attachment should not go against them.]

|| It would seem that sequestrators may justify breaking doors in execution of their office, by analogy to the proceedings under a commission of rebellion, but that they have not a right to seize books and papers of a corporation.

Lowten v. Mayor of Colchester, 2 Mer. R. 395. ||

[It was moved to sell goods taken on a sequestration upon mesne process: but Lord Thurlow refused the motion, a sequestration upon mesne process being only to found the further process of taking the bill *pro confesso*.

Hales v. Shafto, 3 Br. Ch. 72.] || See p. 637. ||

The defendant was prosecuted to sequestration for want of an answer; and the sequestrators having taken eleven hogsheads of cider and other perishable commodities, the plaintiff petitioned to have them sold. But the court refused to do it, until the hearing of the cause, and ordered the petition to come on at the same time with the cause. And now they came on to be heard together, and the bill was taken *pro confesso* against the defendant; and the cider and other perishable goods were ordered to be sold by auction, and the money to be paid into the Bank, subject to the further order of the court.

Wilcocks v. Wilcocks, Ambl. 421, at the Rolls.

A sequestration partakes not of the nature of a *feri facias*, but of a writ of extent on a recognisance or *distringas*, vesting no right in the party, because the execution is not complete, but a further act of the court necessary; which whether by process or order makes no difference: and that further act is, that after seizure by the commissioners of the goods and profits of the lands, and return to the court, the party must apply to the court to have an account of the sequestration taken, and an order made for sale of the goods towards satisfaction of the duty decreed him, without which he cannot have it. For the writ of sequestration does not require the sequestrators to levy to the use of the plaintiff, but only to detain and keep in their hands until the sum is duly paid, the contempts cleared, and the court make further order to the contrary. It is not of a great many years' standing, that the court has ordered goods to be sold *to satisfy payment after a decree*, but it is very lately, that the court has ordered it for a collateral contempt in proceeding *before a decree*; which that court now does in aid of its proceedings.

1 Ves. 183, 184, *per* Lord Hardwicke.

Where there had been an order for payment of money, and the party was in contempt for non-payment, and a sequestration had issued, and the goods were taken; the sequestrators were ordered to sell the goods.

Cavil v. Smith, 3 Br. Ch. Rep. 362; || S. C. *nom.* Cadell v. Smith, 3 Swanst. 308. ||

Upon a commission of sequestration, the commissioners sequestered some live cattle, which not being sufficient to answer the debt, it was moved to sell. But the motion was denied, because the commissioners had not returned the commission. But when that was done, and it appeared what they had sequestered, and the value as to so much in part of the debt, then

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for the remainder, a new sequestration should issue, and a *venditioni exponas* to sell the goods sequestered upon the first. (a)

Yarroth v. Seys, Bunb. 22. || (a) The authorities as to selling goods taken on a sequestration on *mesne* process appear to be at variance. In Shaw v. Wright, 3 Ves. 22, the Lord Chancellor said, he "should not have much difficulty in selling perishable commodities, or the natural produce of a farm;" but in that case no saleable goods were taken. In Simmons v. Lord Kinnaird, 4 Ves. 735, the question was discussed but not decided. In Knight v. Young, 2 Ves. & Bea. 184, Lord Eldon, C., refused the sale; and vide 1 Dick. 335; 2 Dick. 622; Walker v. Bell, 2 Madd. R. 21, where the principal cases are cited. Sequestrators on a decretal order have the same power to sell as on a final decree. Cadell v. Smith, 3 Swanst. 308.||

The act of 5 G. 2, c. 25, empowers the plaintiff to go on, as well upon a sequestration for not appearing, as upon a sequestration for not complying with a decree, which could not be done in equity until then; for according to the first section of that act, where a person does not enter an appearance within the usual time after a subpoena issues, and there is just ground to believe, supported by affidavit, that he is gone out of the kingdom to avoid the process, the court out of which the process issues is to appoint a day for his appearance, to be inserted in the London Gazette, and published on the Lord's Day in the parish church of the defendant: and a copy of the order of the court is to be posted up in some public place at the Royal Exchange in London, if such order be made by the Court of Chancery, Court of Exchequer, or Court of the Duchy Chamber of Lancaster; but, if by any of the courts of equity of the Counties Palatine of Chester, Lancaster, and Durham, or of the Great Sessions in Wales, then in some public place in some market-town within the jurisdiction of any such court, nearest to the place of the defendant's usual abode, if within the jurisdiction; and on the defendant's not appearing within the time limited by the court, the court may order the plaintiff's bill to be taken *pro confesso*, and make such decree thereupon as they shall think just, and to enforce it, may order the defendant's estate or effects to be sequestered, and the plaintiff to be satisfied his demand out of the estate and effects so sequestered, he first giving security to abide such order touching the restitution thereof as the court may make, upon the defendant's appearing to defend the suit, and paying such costs as the court may order; but in default of such security being given by the plaintiff, the court shall order the estate and effects sequestered to remain under their direction, either by appointing a receiver, or otherwise, until the defendant shall appear to defend the suit, and pay such costs to the plaintiff as the court shall think reasonable, or until such order shall be made therein as the court shall think just.

Although a sequestration issue only as *mesne* process to compel an answer, yet, if there is any duty to be performed, it shall remain notwithstanding the defendant offers to pay the costs of the contempt.

Maynard v. Pomfret, 3 Atk. 468.

The court cannot make an order under a sequestration to sell a subject, which passes by title and not by delivery.

Shaw v. Wright, 3 Ves. Jun. 22.] {See 4 Ves. J. 735, Simmons v. Lord Kinnaird; 1 Dick. 107, Sutton v. Stone.} || Vide p. 636, as to ordering a sale.||

Lands were decreed to be liable to 5000*l.* *per ann.* for the life of A., and a sequestration and injunction for the possession to that purpose; the defendant against the injunction enters upon the lands, and receives the profits to the value of 1972*l.*, and thereupon was decreed to pay it; and

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(I) Sequestration, when determined.

after the death of A it was decreed, that the sequestration should continue against the defendant for the payment of that money: and now the defendant moved to have liberty to fell timber to raise money for his subsistence, alleging, that the sequestrators had only the possession and the perception of the annual profits by the course of the court, and therefore it could be no prejudice to have this granted: But Sir H. Grimston, Master of the Rolls, refused. For 1st, This invades the decree which is for the quiet possession, which will be disturbed if the defendant enters to cut down timber. 2d, The defendant not having performed the decree by the payment of the money, he shall not receive any favour from the court whilst he stands in contempt. 3d, If he will with the sale of this timber pay the plaintiff his debt, and so discharge the sequestration, there might be some reason for it; but for him to raise moneys to other purposes, he shall not be favoured; and unless the plaintiff will consent, he shall not have liberty to fell.

4 Feb. 16 & 17 Car. 2, in *Can.*, *Sands v. Darrel*.

[Where a bill is taken *pro confesso* for want of an answer, *qu.* whether the decree shall be absolute, or only *nisi*?

Howell v. Ld. Coningsby, Bunb. 219; *Hughes v. Owen*, Ibid. 299.]

β Sequestrators have no right to seize the tithes of an ecclesiastical benefice.

Ward v. Hayes, 1 Hogan, 107.

A writ of assistance will not be granted to sequestrators.

Brown v. Cuffe, 1 Hogan, 145.g

(D) Sequestration, when determined.

A SEQUESTRATION that issues as a mesne process of the court will be discontinued and determined by the death of the party. But, where a sequestration issues in pursuance of a decree, and to compel the execution of it, there, though the same be for a personal duty, it shall not be determined by the death of the party.

Vern. 58; Vide *infra*.

A sequestration against the father, who appeared to be only tenant for life, was on his death discharged.

Cha. Ca. 241; 2 *Cha. Ca.* 46.

The bill was to revive a sequestration obtained against the defendant's husband for a personal duty before his intermarriage with the defendant, and to avoid the defendant's estate in dower in the lands that were sequestered before the marriage, it being insisted that those lands were so bound by the sequestration, and covered therewith, that the defendant's right of dower could never attach upon them. But on a demurrer to this bill, the demurrer was allowed; and it was ruled, that such a sequestration should not bind the feme who came in for her jointure or dower. But, whether the heir in fee-simple should in such case have the estate bound, and subject to such a sequestration, or not, was doubted; and the case not being before my Lord Keeper, he refused giving any opinion therein.

Vern. 118.

Afterwards this last point came before the same Lord Keeper in another case, when his lordship inclined to think that a sequestration for a personal duty determined with the death of the party, and could not be revived

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against the heir; but his lordship took time to consider of it, and would be attended with precedents.

Vern. 166.

It seems to be now settled, that a sequestration is a personal process, which abates by the death of the party; so that such sequestration being grounded on a decree for a debt or personal duty, cannot be revived against the heir of the defendant: otherwise, in those cases in which the heir is bound.

Bligh v. Earl of Darnley, 2 P. Wms. 621. [So, Wharam v. Broughton, 1 Ves. 182; White v. Hayward, 2 Ves. 464. *Sed contra*, Hawkins v. Crook, 3 Atk. 594.] {1 Dick. 106, Hyde v. Greenhill.} || See Marquis of Caermarthen v. Hawson, 3 Swanst. 294, note.||

[A sequestration issued against J S for not performing a decree, under which lands were seized. J S died, whereupon it was moved, that the sequestration should be discharged. But the court refused it, because the sequestration was not returned; for the sequestrators are answerable for what profits they have received of the lands, and they have nothing to indemnify them, but the authority given by the sequestration.—But, the sequestration being returned, the court discharged it, as to the lands, from the death of J S.

Anon. Bunb. 31.]

|| Under a decree to account, made upon taking the bill *pro confesso* against a defendant who has appeared but not answered, he cannot attend the Master without leave of the court; but leave to attend was given, and the sequestration discharged, upon payment of the costs of the contempt, and of the suit.

Heyn v. Heyn, Ja. R. 49.

As to sequestrations issuing on execution at common law against a beneficed clerk, see *antè*, vol. iii. tit. "EXECUTION," (G) 6; Burn's Ecclesiastical Law, tit. *Sequestration*; Tidd's Prac. 1060, (8th ed.); and 6 Barn. & C. 630; and as to sequestrations by the ecclesiastical courts, see Burn, *ubi sup.* 2 Phill. Rep. p. 1.||

SET-OFF.

β A set-off is a demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim.

Bouv. L. D. h. v.

The term compensation used by the civil lawyers is very similar in its signification to set-off. There is, however, this difference between them. *Compensation* takes place of course by the mere operation of law even unknown to the debtors; the two debts are reciprocally extinguished, as soon as they exist simultaneously to the amount of their respective sums. Compensation is of three kinds, namely: 1, Legal, or by operation of law; 2, By way of exception or plea; 3, By re-convention. (a) *Set-off*, on the contrary, does not in general operate as an extinguishment of both

(A) Nature of, and when first allowed.

claims to the extent of their concurrence, the defendant being at liberty to waive his right to set off, and bring a cross action against the plaintiff. But there are some cases, as, for example, in intestacy and bankruptcy, where, perhaps owing to the peculiar wording of the statute, it has been held that it operated on the right of the parties before action brought, or an act done by either of them.

1 Rawle, 293; 3 Binn. 135; Bouv. L. D., *Compensation, Set-off*. (a) Hanchard v. Cole, 8 Lo. Rep. 158.

In Louisiana it is enacted by act of 1821, p. 118, that the word *set-off* shall have the same meaning that *compensation* has in that state.

Pierce v. Millar, 3 Mart. Rep. N. S. 355.

The term *discount* is also used sometimes as synonymous with *set-off*.
Mandeville v. Patton, 3 Call, 9; 4 Munf. 215; Vin. Ab. h. v.g

(A) || Nature of, and || when first allowed.

(B) In what actions.

(C) What Debts may be set off.

1. || *As to the Nature of the Demand.*

2. *As to the Character of the Parties; And herein of Agents, Factors, Insurance Brokers, Assignees, &c.* ||

(D) Where the Defendant must plead a Set-off, and where he may give Notice of Set-off; and herein of the Form of each, || and of Particulars of Set-off. ||

β (E) Of the effect of a Set-off.g

(A) || Nature of, and || when first allowed.

At common law, if the plaintiff was as much, or even more indebted to the defendant, than the defendant was indebted to him, yet he had no method of striking a balance: the only way of obtaining relief was to go into a court of equity. To remedy this inconvenience, it was enacted by the statute of 2 G. 2, c. 22, § 13, "That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other; and such debt may be given in evidence on the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt intended to be insisted on, and upon what account it became due; otherwise such matter shall not be allowed in evidence upon the general issue."

2 Burr. 826. β To entitle the defendant to a set-off, the debts must be mutual. Pitkin v. Pitkin, 8 Conn. 325; Palmer v. Green, 6 Conn. 14; Francis v. Rand, 7 Conn. 221; Stedman v. Jilson, 10 Conn. 55; Blanks v. Smith, Peck's R. 186; Robertson v. Talbot, 2 Yerg. 258. The statute does not apply to goods wrongfully detained, and such goods cannot be set off. Jarvis v. Rogers, 15 Mass. 389.g

Where a set-off is admissible, the parties are alternately plaintiff and defendant; so that if the cross demand or any part be within the statute of limitation, that objection may be replied to it, in like manner as it may be pleaded in bar to the declaration.

Remington v. Stevens, 2 Stra. 1271

(B) In what Actions.

¶ Unless the statute is replied, a debt accruing above six years before the suit may be set off.

Hicks v. Hicks, 3 East, 16; *sed vide* 2 Stark, 497; (*qu. whether this decision is law?*) and see 1 Esp. Ca. 569. ¶ *β* The statute of limitations is a good replication to a plea of set-off. Alsop v. Nichols, 9 Conn. 357; Stanley's Executors v. Green, Mart. (N. C.) Rep. 60.*g*

(B) In what Actions.

A SET-OFF is allowable in actions of *debt*, *covenant*, and *assumpsit*, for the non-payment of money; but not in *actions upon the case*, *trespass* or *replevin*, (*a*) &c.; nor of a penalty, in debt on bond conditioned for the performance of covenants; (*b*) nor of *general damages* in covenant, (*c*) or *assumpsit*. (*d*) But where a bond is conditioned for the payment of an annuity, (*e*) or of *liquidated damages*, (*g*) a set-off may be allowed.

(*a*) Barnes, 450; Bull. N. P. 181, S. C., Graham v. Fraine, Hil. 24 G. 2; and Laycock v. Tuffnell, E. 27 G. 3, B. R., S. P.; Tidd's Pr. 404; Sapsford v. Fletcher, 4 Term R. 511; *β* Roebuck v. Tennis, 5 Monr. 83; Keeler v. Adams, 3 Caines, 84. (*b*) Bull. N. P. 179; 2 Burr. 1024. (*c*) Howlet v. Strickland, Cowp. 56. (*d*) Freeman v. Ryett, 1 Bl. R. 394; {2 Johns. Rep. 150, Gordon v. Bowne.} (*e*) Collins v. Collins, 2 Burr. 820. (*g*) Fletcher v. Dyche, 2 Term R. 32.

β In an action for a tort, the defendant cannot set off.

Keeler v. Adams, 3 Caines, R. 84.

No set-off can be admitted in an action on an open policy of insurance although the demand be for a total loss, as the damages are uncertain and unliquidated.

Gordon v. Bowne, 2 Johns. 150.

In an action on an award, a set-off is allowable.

Burgess v. Tucker, 5 Johns. 105.

In general a set-off is not allowed in the admiralty.

The Ship Mentor, 4 Mason, 84.

A court of admiralty will not allow a set-off, except so far as it grows out of a maritime contract submitted to its cognisance; and then principally by way of compensation, and not as an independent right.

Willard v. Dorr, 3 Mason, 161.

In replevin, when the complaint is for unjustly taking and detaining property; plea that it was taken for rent in arrear, and replication that there is no rent in arrear; a book account cannot be set off under these pleadings.

Swing v. Sparks, 3 Halst. 29.

In Pennsylvania, a set-off is not allowed in replevin.

Fairman v. Fluck, 5 Whart. 516; Peterson v. Haight, 3 Whart. 150; Beyer v. Fenstermacher, 2 Whart. 95. But the tenant may deduct from the rent damages he may have sustained from the landlord's breach of covenants in the lease, relating to the demised premises, and constituting a part of the consideration of the rent. 3 Whart. 150; 2 Whart. 95; 1 Miles, 250; Phillips v. Monges, 4 Whart. 226; Warner v. Caulk, 3 Whart. 193.*g*

{ The defendant may plead a set-off in an action for the penalty of a bond conditioned for the performance of an award, in which the breach assigned is the non-payment of a sum of money awarded.

5 John. Rep. 105, Burgess v. Tucker.

In debt on bond, defendant pleaded a greater debt in bar; upon which the plaintiff prayed to have the condition of his bond enrolled, which was

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to appear at Westminster, and demurred; and it was holden that this bond was not written the 8 Geo. 2, for that statute relates only to bonds conditioned to pay money, and not to bail-bonds; and it was not within the 2 Geo. 2, because the plaintiff did not bring the action in his own right, but as trustee for another, (for he was an officer in the palace-court;) but if it had been given to the sheriff, and by him assigned to the party, it might be otherwise, and then the penalty would have been considered as the debt, because it would have depended upon the 2 Geo. 2.

Willis, 261, *Hutchinson v. Sturges*; Buller, 179, S. C.}

|| *Qu.* Whether a set-off can be pleaded against a claim enforced by extent?

Rex v. Sherwood, 3 Price, 269.||

(C) What Debts may be set off.

|| 1. *As to the Nature of the Demand.*||

§ 1. Of claims before judgment.g

It having been doubted, whether mutual debts of a *different* nature could be set against each other under the above clause in the act of 2 Geo. 2, c. 22, it was enacted by 8 Geo. 2, c. 24, § 5, "That by virtue of the said clause mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty, contained in any bond or specialty; and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued or shall accrue by reason of any such penalty, the debt intended to be set-off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side: and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

The day after this act of 8 G. 2 passed, Lord Hardwicke, C. J., delivered the opinion of the Court of King's Bench, that a debt by a simple contract might, by the former act, have been set off against a specialty debt. *Brown and Holyoak*, 8 G. 2, Bull. N. P. 179.

A debt barred by the statute of limitations we have seen cannot be set off: if pleaded, the statute may be replied to it; if offered in evidence under a notice of set-off, this objection may be made to it at the trial.

Bull. N. P. 180; || 3 East, 16; and see *antè*, p. 640.||

As a set-off cannot be pleaded to an action of covenant for *general* damages, so neither can uncertain damages be pleaded by way of set-off to an action of covenant for rent.

Weigall v. Waters, 6 Term R. 488.

{ So in debt upon a bond given for the consideration money of a tract of land and mill sold by the plaintiff to the defendant, with a reservation of a right to swell and rouse the water so as not to injure the mill, the defendant cannot set off unascertained damages occasioned by the plaintiff's having raised the water so as to injure the mill.

2 Dall. 237, *Kacblin v. Mulhallon*.

So, in an action by assignees of a bankrupt for money due to the bankrupt as supercargo of a ship, the defendant cannot set off a claim against

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the bankrupt for not keeping the vessel fully insured according to orders, as the damages are uncertain.

2 Cain, 33, *Brown v. Cuming*. See 1 Johns. Rep. 56, *McCumber v. Goodrich*.

A defendant cannot set off a claim for bad debts made by the misconduct of the plaintiff in selling his goods as factor. Such misconduct is properly to be inquired into in a suit for that purpose.

2 Cran. 342, *Winchester v. Hackley*. If a set-off, which cannot legally be made, be pleaded and not objected to, and a jury pass upon it, the consent of parties thus to be implied will take away the error; and it then becomes a bar to a subsequent suit for the demand set off. 3 Cain, 152, *King v. Fuller*.

In assumpsit for goods sold, a debt due at the commencement of the action may be set off, though the goods were sold for *ready money*; but the jury would take into their consideration the loss sustained by non-payment of the ready money.

1 East, 375, *Eland v. Karr*.

Since the statutes 2 & 8 Geo. 2, the courts have been gradually extending this equitable remedy of set-off. In the outset of a suit, they compel the plaintiff to make a set-off in the affidavit to hold to bail, and will not suffer him to swear to one side only of the account. So at the close of the suit, the same reason and the same analogy extend to set off mutual judgments, and thereby narrow the greater execution, in whatever court it happens to be.

1 Sellon, 322, 323.

Thus a judgment in one action may be set off against a judgment in another action, though obtained in different courts.

2 W. Black. 869, *Barker v. Braham*; 3 Wils. 396, S. C.; 8 Term, 69, *Glaister v. Hewer* and others; 3 Cain, 190, *Schermerhorn v. Schermerhorn*; 1 Johns. Rep. 144, *Brewerton v. Harris*; 3 Johns. Rep. 247, *Devoy v. Boyer*.

So where parties have mutual demands of costs against each other, the court, on motion, will order them to be set off, though they accrued in a different court.

1 H. Black. 23, *Schoole v. Noble*; *Ibid.* 217, *Nunez v. Modigliani*; *Ibid.* 657, *O'Conner v. Murphy*; 2 Bos. & Pul. 28, *Hall v. Ody*; 4 Bos. & Pul. 22, *Emden v. Darley*. See *Ibid.* 311, *Hill v. Tebb*.

So the costs of one judgment {¹} may be set off against the debt and costs of another; or interlocutory costs {²} in the same cause against the debt and costs recovered.

{¹} 2 W. Black, 826, *Thrustout v. Crafter*; {²} 8 East, 362, *Howell v. Harding*.

And so far have the courts exercised this equitable jurisdiction, that where the plaintiff had recovered a judgment against the defendant, and the defendant had also recovered in another action against the plaintiff and another; upon a motion to set off the debt and costs of the latter against the judgment of the former, although the one was a debt due to the plaintiff alone, whereas the other was the joint debt of the plaintiff and another to the defendant; and although it was observed, that it was not such a debt as could be set off, yet the court made the rule absolute; Lord Kenyon saying, that this case did not depend on the statutes of set-off, but on the general jurisdiction of the court over the suitors in it; that it was an equitable part of their jurisdiction, and had been frequently exercised.

4 Term, 123, *Mitchell v. Oldfield*; and see 2 Cain, 105, *Cole v. Grant*. But in *Doe v. Darnton*, 3 East, 150, Lord Ellenborough, C. J., expressed a strong disinclination

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to extend the power of setting off debts, on general grounds of equity, beyond the line which the legislature had thought proper to mark out.

A judgment recovered by A against B and C will not be set off against another judgment recovered against A by the assignees of B under an insolvent debtor's act, as the interest of third persons intervenes, in whose favour there are peculiar trusts by the statute.

3 East, 149, *Doe v. Darnton*.

A set-off reducing the plaintiff's demand under 40s. does not affect the jurisdiction of the superior courts.

1 Wils. 19, *Pitts v. Carpenter*; 2 Str. 1191, S. C.; Doug. 448, *Heaward v. Hopkins*; 1 Bos. & Pul. 223, *M'Collum v. Carr*. See 1 Dall. 308, *Cooper v. Coats*; 2 Dall. 74, *Brailey v. Miller*; 2 Cain, 107, *Van Antwerp v. Ingersoll*.]

|| In an action on a covenant to pay certain sums of money, and to indemnify the plaintiff against all damages which he may sustain by the non-payment thereof, a set-off is not allowable, as the plaintiff's claim is for general damages, which may go beyond the specific sums unpaid.

Auber v. Lewis, Mann. Ind. N. P. 251; and see *Grant v. Royal Exchange Assurance*, 5 Maul. & S. 439.

So, in *assumpsit* by an accommodation acceptor against the drawer of bills, for not providing him with funds for payment of them, and for not indemnifying plaintiff against loss and damage by reason of his acceptance, a plea of set-off was held bad on general demurrer, as the plaintiff might be entitled to special damage.

Hardcastle v. Netherwood, 5 Barn. & A. 93.

So, in an action for not accepting a bill at two months, in payment of goods, according to contract, there can be no set-off.

Hutchinson v. Reid, 3 Camp. 329.

If, according to the original contract, a deduction is to be made in a certain event from the sums due from the one party to the other, this is not strictly a set-off, and the deduction may be made without plea or notice of set-off. Thus where, in an action by a dyer for work and labour in dyeing hats, it appeared that it was the custom of the hat trade that all damage to hats in dyeing should be deducted from the price of the work, the defendant was held entitled to deduct damage sustained by the hats without a plea or notice of set-off. But, in an action by a servant for wages, the master cannot set off the value of goods lost by the servant's negligence, although the servant has admitted his liability, this not being a part of the original agreement.

Bamford v. Harris, 1 Stark. Ca. 343; *Le Loir v. Bristow*, 4 Camp. 134.

In *assumpsit* for goods sold and delivered, defendant may set off money due upon plaintiff's acceptance, of which defendant has become the holder since the sale and before the delivery of the goods: and this, although he agreed to pay plaintiff ready money for them; for the plaintiff, if he meant to insist on ready money, should not have parted with the goods.

Cornforth v. Rivett, 2 Maul. & S. 510; and see *Eland v. Karr*, 1 East, 375; *Lechmere v. Hawkins*, 1 Esp. Ca. 25.

As to set-off of costs, see *Tidd's Pract.* 1028, (8th ed.)||

§ To allow a set-off, the plaintiff's cause of action must be specific and certain, and of such a nature that it could be set off by a defendant, if it existed in him.

Gordon v. Bowne, 2 Johns. 150; *Burgess v. Tucker*, 5 Johns. 105.

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A bond debt may be set off against any demand recoverable under the common counts, or for which *indebitatus assumpsit* will lie.

Downer v. Eggleston, 15 Wend. 15.

In *assumpsit* to recover rent of demised premises, the tenant is not entitled to set off the damages sustained by him by the breach of the agreement to repair entered into on the part of the landlord.

Sickels v. Fort, 15 Wend. 559.

A note of one of two partners cannot be set off against a partnership demand.

Ladue v. Hart, 5 Wend. 583; Gram v. Cadwell, 5 Cowen, 489.

Where the demand for which a party sues would not have been a proper subject of set-off in an action against him, no demand which the defendant has against the plaintiff can be set off in the action in his favour; for example, when a tenant sues his landlord to recover costs of the defence of summary proceedings instituted against the latter, it was held, that the landlord was not entitled to set off against such demand rent due to him from the tenant.

Osborn v. Etheridge, 13 Wend. 399.

In an action of covenant for rent by the landlord, the defendant cannot set off damages that he may be entitled to recover against the landlord, on covenants contained in the same indenture on which the action is brought.

Tuttle v. Tompkins, 2 Wend. 407.

When a plaintiff brings an action for a part of an indivisible demand, and there is a verdict and judgment for such part, the remainder cannot be set off.

Miller v. Covert, 1 Wend. 487. See Smith v. Jones, 15 Johns. 229; Farrington v. Payn, 15 Johns. 482; Willard v. Sperry, 16 Johns. 121; Phillips v. Berick, 16 Johns. 136.

A note cannot be set off against a judgment.

Ex parte Bagg v. Jefferson, C. P. 10 Wend. 615.

Damages arising from a tort cannot be set off.

Sherman v. Ballou, 8 Cowen, 304.

A claim recoverable only by action of account, or by bill in equity, cannot be set off at law.

8 Cowen, 304.

A set-off is not allowable for uncertain damages, arising out of articles of agreement.

Hepburn v. Hoag, 6 Cowen, 613; Edwards v. Davis, 1 Halst. 394; Taylor v. Stout, Coxe, 53; Smock v. Warford, 1 South. 306.

A bond which has been cancelled cannot be set off.

Williams v. Crary, 5 Cowen, 365.

A person who becomes the holder of the bills of a bank after it has stopped payment, and before a suit against him by the bank, may set them off in a suit by the bank against him.

Jefferson Co. Bank v. Chapman, 19 Johns. 322.

The demand to be set off must have existed at the commencement of the suit.

Carpenter v. Butterfield, 3 Johns. Cas. 145; Tuttle v. Barker, 8 Johns. 152; 19 Johns. 322; Gordon v. Bowne, 1 Caines, R. 513. But see Clark v. Magruder, 2 Harr. and Johns. 77.

(C) What Debts may be set off.

A note endorsed after it has become due, cannot be set off in an action brought against the endorsee by the assignee of the maker.

Anderson v. Van Allen, 12 Johns. 343.

Nor can a note made by an insolvent, and purchased by the defendant after it became due, be set off in an action brought by the assignees of the maker.

Johnson v. Bloodgood, 1 Johns. Cas. 51; 2 Caines Cas. Err. 302.

In an action brought by the assignees of a bankrupt, the defendant cannot set off a check issued by the bankrupt payable to bearer, and bearing date previous to the bankruptcy, unless he prove further, that the check came to his hands previous to the bankruptcy.

Ogden v. Cowley, 2 Johns. 274.

A debtor of the United States, at the trial, cannot set off a claim due to him by the United States, unless such claim shall have been submitted to the accounting officers of the treasury, and by them rejected, except in cases provided for by statute.

United States v. Giles, 9 Cranch, 212. See United States v. Macdaniel, 7 Peters, 1. United States v. Lent, Paine's R. 417.

A defendant cannot set off a claim for bad debts, made by the misconduct of the plaintiff in selling the defendant's goods as factor, the plaintiff not having guaranteed those debts.

Winchester v. Hackley, 2 Cranch, 342.

Joint debts cannot be set off, in equity or at law, against separate debts.

Jackson v. Robinson, 3 Mason, 138; Howe v. Sheppard, 2 Sumn. R. 409.

To a writ of *scire facias*, directed to the defendant to show cause why money received by virtue of a judgment in the Supreme Court in his favour, which had been reversed in the court of appeals, should not be restored to the plaintiff, the defendant cannot set up by way of set-off the original cause of action upon which the judgment of the Supreme Court had been given.

Conover v. Scott, 6 Halst. 400.

In *assumpsit* for work and labour, the defendant may show that the services had not been performed in the manner agreed upon; and specified penal sums for the plaintiff's refusal or non-performance of work, being in the nature of liquidated damages, may be set off against his claim.

Marshall v. Hann, 2 Har. (N. J.) R. 425.

Wherever debt or *indebitatus assumpsit* will lie, a set-off will be allowed.

Martin v. McAlister, 2 Yerg. 111.

Unliquidated damages to be assessed by the discretion of the jury, cannot be set off; but unliquidated damages to be assessed on pecuniary demands, as for goods sold and delivered, and in all cases where *indebitatus assumpsit* will lie, may be set off.

Ragsdale v. Buford's Executors, 3 Hayw. 192. See Hogg's Executors v. Ashe, 1 Hayw. 471.

Insurers liable for a loss may set off the amount due on the premium note, such being the stipulation on the policy. (a) They may also set off premiums against losses arising on different policies entered into with the same party. (b)

(a) Livermore v. Newburyport Ins. Co., 2 Mass. 232; Dodge v. Union Marine Ins. Co. 17 Mass. 471. (b) Cleveland v. Clap, 5 Mass. 201.

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A defendant may set off against the plaintiff's demand a note of the plaintiff, which became due since the commencement of the action.

Clark v. Magruder, 2 Harr. & Johns. 77. But see 3 Johns. Cas. 145; 8 Johns. 152; 19 Johns. 322.

In an action on a promissory note, endorsed to a bank, where the bank is the plaintiff, a defendant cannot set off against the claim of the bank any stock he may have therein.

Whittington v. The Farmers' Bank, 5 Harr. & Johns. 489.

Where debts are due in *autre droit*, there can be no set-off at law or in equity.

Gale v. Luttrell, 1 Y. & J. 180; Scholfield v. Corbett, 6 Nev. & M. 527.

An agreement by a broker, that he will sell goods for his principal, and pay over the proceeds without setting off a debt due to him by the principal, is not binding upon the broker so as to deprive him of the right of set-off.

M'Gillivray v. Simson, 9 D. & R. 35; S. C. 2 Car. & Payne, 320.

Where the parties had expressly agreed that a particular question should be tried between them, the court refused the defendant the advantage of a set-off which it was the intention of both parties he should not have.

Gould v. Oliver, 6 Scott, 648.

A defendant can set off those debts only which were due to him from the plaintiff at the time of the action brought, as well as at the time of plea pleaded.

Braithwaite v. Coleman, 4 Nev. & M. 654.

By articles of agreement for altering and repairing a warehouse, for a fixed price, it was stipulated that in the event of the work not being completed in three months, the builder should forfeit and pay to the other party five pounds weekly; and every week such penalty to be deducted from the amount which might remain due on the completion of the work. Held, in an action brought for extra work, that the employer was entitled, after having paid the contract price, to set off the penalty against the extra work.

Duckworth v. Alison, 1 Mees. & Wels. 412.

A set-off is allowable only in favour of a defendant, consequently there cannot be a set-off against a set-off.

Ulrich v. Berger, 4 Watts & S. 19.

To an action of debt on an account stated, an independent debt, not included in such account, may be set-off.

Vuyton v. Breuil, 1 Wash. C. C. R. 467.

Evidence of damages arising from misfeasance, or non-feasance, arising from the same transaction on which the plaintiff's cause of action arises, may be given for the purpose of defeating the plaintiff's action, in whole or in part, but not by the way of set-off.

Gogel v. Jacoby, 5 S. & R. 122. See De Tastet v. Crousillat, 1 Wash. C. C. R. 504; Heck v. Shener, 4 S. & R. 249; Steigleman v. Jeffries, 1 Serg. & Rawle, 477; Shaw v. Badger, 12 S. & R. 275; Light v. Støever, 12 S. & R. 431.

In an action by factor against his principal, the latter cannot set off a claim for damages, arising from the conduct of the plaintiff or factor.

Gorbier v. Emery, 2 Wash. C. C. R. 413.

In an action by the United States, the defendant cannot set off a claim

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which depends upon the pleasure of the government, and which cannot be legally enforced.

United States v. Wells, 2 Wash. C. C. R. 161.

In Pennsylvania, damages arising from the breach of warranty of goods sold may be set off in an action on a note given in a different transaction.

Phillips v. Lawrence, 6 Watts & Serg. 150. See Carman v. The Franklin Fire Insurance Company, 6 Watts & Serg. 155.

A demand assigned to the defendant, before the commencement of the suit may be set off though he has not actually paid it, but only agreed to pay.

Everett v. Strong, 5 Hill, 163.

§ 2. Of Judgments.

In directing a set-off of judgments, courts of law proceed upon the equity of the statute, authorising set-offs.

Simpson v. Hart, 14 Johns. 63. See Schroppel v. Jewell, 1 Cowen, 208; Davidson v. Geohagan, 3 Bibb, 233.

A party must be beneficially as well as the nominal owners of a judgment, in order to entitle him to set-off.

Satterlee v. Ten Eyck, 7 Cowen, 480.

A judgment purchased by a party with a view to set it off, and with a condition that if he fails to obtain the set-off on motion, the assignment shall be void, and accompanied with a stipulation that the assignee shall be indemnified against the costs of the motion, cannot be set off.

Gilman v. Van Slyck, 7 Cowen, 469.

If a defendant in execution escape, the plaintiff is remitted to his former rights, and he may use the judgment as a set-off against a demand of the defendant.

M'Guinity v. Herrick, 5 Wend. 240.

A judgment obtained by attachment in a justices' court, without defendant appearing there, cannot be set off on motion, against a judgment of a court of record.

People v. Judges of Delaware, 6 Cowen, 598.

But a judgment obtained after a summons or appearance, before a justice, will be set off in the Supreme Court against a judgment obtained there.

Ewen v. Terry, 8 Cowen, 126.

When a judgment is set off and allowed against another, it is extinguished.

Schroppel v. Jewell, 1 Cowen, 208. But, notwithstanding a set-off is allowed in an action on an arbitration bond, the penalty of the bond remains a security for all future breaches of the condition. Burgess v. Tucker, 5 Johns. 105.

Judgments in cross actions will be set off against each other, on application to the court, so far as the same will extend, and execution will issue for the remainder.

Goodenow v. Butrick, 7 Mass. 140; Makepeace v. Coates, 8 Mass. 451; Green v. Hatch, 11 Mass. 195; Winslow v. Hathaway, 1 Pick. 211; Holmes v. Robinson, 4 Ohio, 91; Dunkin v. Calbraith, 1 P. A. Browne's Rep. 48.

But such judgments will not be set off, when it appears that other persons are interested by the assignment of the demand on which one of the judgments has been rendered.

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One judgment may be set off against another, although obtained in a different court.

Noble v. Howard, 2 Hayw. 14; *S. P. Best v. Lawson*, 1 Miles, 10.

§ 3. Against what claims there may be a Set-off.

In an action upon a sealed note, by which the defendant promises to pay "without defalcation for value received," he is not thereby precluded from a defence upon the plea of set-off.

Louden v. Tiffany, 5 Watts & S. 367. See 3 Whart. 275.g

§ 2. *As to the Character of the Parties: And herein of Agents, Factors, Insurance-Brokers, &c.*||

The debt sued for, and the debt intended to be set off, must be mutual, and due in the same right. Hence a defendant sued as executor or administrator cannot set off a debt due to him in his own right; nor, if sued for his own debt, can he set off a debt due to him as executor or administrator. Neither can a joint debt be set off against a separate demand, nor a separate debt against a joint one.

Bull. N. P. 180. || *Jones v. Fleeming*, 7 Barn. & C. 217.|| {1 Wash. 79; 1 Hen. & Mun. 176; 1 Bin. 69. Part owners of a ship cannot set off their proportions of a debt to a bankrupt or that account, against the debts due by the bankrupt to them severally. 10 Ves. J. 105. *Ex parte Christie*.—If an executor sues in his own name for money of the testator received after his death by the defendant, the defendant cannot set off a debt due to him from the testator. *Willes*, 103, *Shipman v. Thompson*. See 1 Wash. 167, *White v. Bannister's Exrs.*; *Ibid.* 221, *Brown's Admx. v. Garland*.}

{A is indebted to B and C, partners in trade, who issue a foreign attachment against his effects in the hands of D. After the death of B and C, the executors of C, who was surviving partner, obtain judgment against A and the garnishee. B and C were the endorsers of a note which was discounted by D, and which fell due after their death and was protested for non-payment. The debt to D by B and C cannot be set off against the debt due by D as garnishee of A to C's executors. A's debt, upon the death of B and C, became vested in their creditors generally, whose rights could not be changed by any subsequent proceedings between the executors and garnishee.

1 Bin. 64, *Cramond v. Bank of the United States*.}

|| But, by special agreement between the parties, joint debts may be set off against separate debts.

Kinnerly v. Hossack, 2 Taunt. 170.

And where A owed B on judgment 700*l.*, and then recovered against him and others damages in trespass, B being the trespasser chiefly concerned, and bound to indemnify his co-defendants, the Court of Common Pleas allowed B to set off the one judgment against the other.

Bourne v. Benett, 4 Bing. 423. The Court of Common Pleas in many instances have allowed set-off of costs and judgments, though the parties in the two actions were in some measure different. See *Tidd*, 1028, (8th ed.) The Court of Chancery will not set off costs in a suit of chancery against costs in a suit at law, between the same parties. *Wright v. Mudie*, 1 Sim. & Stu. 267; and see *Taylor v. Popham*, 15 Ves. 72, 539. As to set-off of costs, see *Tidd's Prac. ubi supra*.||

In an action against a man on his own bond he cannot set off a debt due to him in right of his wife.

|| *Bull. N. P.* 179 a; and see 7 Price R. 550.||

|| Nor in an action by the husband alone, can a debt be set off due by

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the wife *dum sola* to defendant, unless the husband has promised to pay it since the marriage, and has thereby made it his own.

Wood v. Akers, 2 Esp. Ca. 594. || β A debt due from the wife *dum sola*, cannot be set off against a note given to the wife after marriage, if the husband elect to treat the note as his several property. Borough v. Moss. 5 M. & R. 296.*g*

β Where a lease is made by husband and wife of premises belonging to the wife, and an action is brought for the recovery of the rent, the lessee is entitled to set off a demand due by the husband alone, although the suit be in the names of both husband and wife.

Ferguson v. Lothrop, 15 Wend. 625.

A note of one of two partners cannot be set off against a claim belonging to the partnership.

Ladue v. Hart, 5 Wend. 583 ; Gram v. Caldwell, 5 Cowen, 489. But see 7 Wend. 326.

A party who has neither a general nor special property in goods placed by him in the hands of a manufacturer for finishing, who refuses to redeliver them on demand, cannot set off the value of such goods, in an action of *assumpsit* against him by the manufacturer, for work and labour bestowed upon other goods.

Collins v. Butts, 10 Wend. 399.

In an action brought by husband and wife against her father's executors, to recover a legacy given to the wife "for her own use," a debt due by the husband to the testator cannot be set off.

Jamison v. Brady, 6 Serg. & R. 466.*g*

A debt due to a defendant as a surviving partner, may, however, be set off against a demand upon him in his own right : and so *vice versa*.

Slipper v. Stidstone, 5 Term R. 493 ; French v. Andrade, 6 Term R. 582. β As to setting off debts due by one partner against a partnership demand, see Terran v. De Lustra, 2 Lo. Rep. 326 ; Gomes v. Ramos, 2 Lo. Rep. 426 ; Morton v. Graham, 11 Lo. Rep. 453 ; Thomas v. Elkins, 4 Mart. R. 378 ; Bibb v. Saunders, 2 Bibb, 86 ; Print. Dec. 264.*g*

β In an action brought by an ostensible and a dormant partner, the defendant may set off a debt due by the ostensible partner only.

Lord v. Baldwin, 6 Pick. 348.*g*

|| If plaintiff and defendant are partners in a concern, and plaintiff sue defendant for a debt separate from the concern, defendant cannot set off a balance due to him on the partnership account ; for he could not sue for such balance while the partnership lasted, and therefore cannot set it off.

Fromont v. Coupland, 2 Bing. 170. ||

To an action brought by or against a *trustee*, a set-off may be made of money due to or from the *cestui que trust*.

Bottimley v. Brooke, M. 22 G. 3. C. B. ; Rudge v. Birch, M. 25 G. 3. B. R. ; 1 Term R. 621, 622. || See 1 Maul. & S. 555. || {2 Cran. 342, Winchester v. Hackley ; 1 Bin 496, Canby v. Ridgway ; 3 Johns. Rep. 263, Ruggles v. Keeler. The cases of Bottimley v. Brooke, and Rudge v. Birch, are said to have been overruled in England in a case of Lane v. Chandler in the exchequer. 7 East, 153.}

β In an action of debt on a sealed note, if the plaintiff of record is merely nominal, and the real interest in the note is in another, a set-off may be made against the latter.

Stanley's Executors v. Green, Martin, (N. C.) Rep. 60.

A debt due to the defendant by a person for whose benefit the suit is prosecuted may be pleaded as a set-off.

Ward v. Martin, 3 Monr. 19.

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Debts which can be set off must be due in the same right.

Darrach's Executors v. Hay's Administrators, 2 Yeates, 208; *Dunkin v. Calbraith*, 1 P. A. Browne's R. 47.

But a person having a right of action may set off a debt due to him as trustee, against a debt due by him in his own right.

Wolf v. Beates, 6 S. & R. 244. See *Murray v. Williamson*, 3 Binn. 135.

The plaintiff as administrator sold goods of the intestate to the defendant, and obtained the note of the latter for the purchase-money. On an action on this note, held, that the defendant could not set off a debt due to him by the intestate.

Wolfsberger v. Butcher, 10 S. & R. 10. See *Wilmarth v. Mountford*, 8 S. & R. 124.

One of two defendants may in general set off a debt due to him by the plaintiff, unless there is some superior equity in a third person.

Stewart v. Coulter, 12 S. & R. 252; *Childerson v. Hammond*, 9 Serg. & R. 68. See *Henderson v. Lewis*, 9 Serg. & R. 379.*g*

|| But a defendant cannot set off a debt due on a bond made by the plaintiff to a *third party*, and by him assigned to the defendant; for the legal debt is due to the obligee, and not to the defendant.

Wake v. Tinkler, 16 East, 36. Lord Ellenborough, C. J., said, the doctrine of *Bottimley v. Brooke*, and *Rudge v. Birch*, was rather to be restrained than extended.

And although in this case the bond was a *chose* in action not assignable, and therefore not *legally* vested in the defendant, yet the principle is the same in the case of a bill of exchange accepted by the plaintiff (which is legally assignable,) if the bill is in fact vested in a third party, and only transferred to the defendant for the purpose of being set off against a sum due from the defendant to the plaintiff, for goods bought by the defendant of the plaintiff, with the *intention* of setting off this acceptance; for in such case the defendant holds the acceptance only as a trustee for the real owner, and no debt is *bonâ fide* due upon it to the defendant.

Fair v. M'Iver, 16 East, 130.

The same mutuality is requisite to constitute a mutual credit under the bankrupt laws, which is required to make mutual debts under the statute of set-off. Thus, where three partners, A, B, and C delivered bills to D for a special purpose, and A and B became bankrupts; in an action by their assignees against D for the proceeds of the bills, it was held, that C not having become bankrupt, this was not a case of mutual credit within the bankrupt law, so as to entitle the defendant to set off, against the bills, a debt due to him from A, B, and C.

Staniforth v. Fellowes, 1 Marsh. R. 184. See *post*, 654, as to mutual credit.

The general rule is, that the debts must be mutual, and the debt claimed to be set off must be legally due from the plaintiff on the record. There are, however, some cases in which the defendant may have a right to set off against the plaintiff's claim a debt due to defendant from a third party. These are principally cases where factors and agents, in dealing for their principals, do not disclose their representative character. Under these circumstances, a person dealing with them, and ignorant of their representative character, may, in general, set off against the demand of the principal a debt due from the factor to himself.

George v. Clagett, 7 Term R. 359; *Rabone v. Williams*, 7 Term R. 360, n.; *Carr*

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v. Hincheliff, 4 Barn. & C. 547 ; β Hills v. Tallman's adm'r, 21 Wend. 674 ; Wheeler v. Richmond, 5 Cowen, 231 ; S. C. 9 Cowen, 295 ; Satterlee v. Ten Eyck, 7 Cowen, 480.*g*

But circumstances which show collusion between the factor and buyer, as the insolvency of the factor known to the buyer, will deprive the latter of his right of set-off.

Escot v. Milward, 7 Term R. 361, (b).

And this right does not arise in a dealing with a *broker*, for his character is materially different from that of a factor ; as he has not the possession of the goods, he does not appear to the world as owner ; and if he sells without disclosing his principal, he acts beyond the scope of his authority ; the buyer, therefore, cannot set off against the principal's demand a debt due from the broker. It follows, therefore, that in dealing with a person known to be in the habit of acting as a broker, a buyer should presume that he is a mere agent, until the contrary appears ; whereas in dealing with a *factor*, the mere general knowledge that he is a factor, will not deprive a buyer of the privileges arising from his acting as a principal, unless the buyer knows that he acts only as factor in that *particular transaction*. The buyer, however, need not have this knowledge at the time of the *sale* of the goods ; if he has it at any time before the *completion* of the delivery, he cannot set off the factor's debt.

Baring v. Corrie, 2 Barn. & A. 137 ; Moore v. Clementson, 2 Camp. R. 22.

As the buyer's right of set-off of a factor's debt arises from the presumed deception to which he is subjected, by the principal's suffering the factor to deal with the goods as his own, the buyer cannot of course have any such right to set off against the owner of goods a debt due to the buyer from *his own* broker employed to purchase them ; since such broker is the agent of the buyer, and not of the owner.

Waring v. Favenc, 1 Camp. 85. β In South Carolina, debts due by a factor who made the sale, cannot be set off in an action by the principal for the price. Atkinson v. Treadale, 1 Bay, 299.*g*

β An insolvent deposited goods with a factor for sale, the factor sold them to one who was a creditor of the insolvent, in an action by the factor against the purchaser, held, that the latter could not set off the debt due to him by the insolvent.

Boinod v. Pelosi, 2 Dall. 43.*g*

Upon the above principle,—viz., that a party dealing with an individual suffered to hold himself out as dealing on his own account, is not to be prejudiced by the appearance of another party to the transaction of whom he was ignorant,—it is decided, that where a person becomes indebted for goods sold to an ostensible partner, who appears to the world as trading *alone*, the debtor may set off a debt due from such partner alone, against an action for the goods brought by him and his dormant partner.

Stracey v. Deey, 7 Term R. 361, n. ; et vide Peake's Ca. 197.

The distinction above stated, between brokers and factors, must be understood in reference to the class of brokers alluded to in Baring v. Corrie, viz., sworn brokers for buying and selling merchandise ; for *insurance-brokers* do not appear to be in the same manner distinguishable from factors.

The insurance-broker, in effecting a policy with underwriters, is now held in all cases to be so far in the situation of a principal, that he is personally liable to the underwriters for the premium ; and this, whether he

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effect the policy as agent or in his own name: for the custom of dealing is, for the underwriters to look to him and not to be assured, and the receipt for the premium contained in every policy is conclusive as between the underwriter and the insured. Hence it follows, that in an action by the assured against the underwriter for a total loss, the underwriter cannot set off the amount of premium, although in fact it have never been paid him by the broker. It would seem, however, that if it were agreed between the broker and underwriter, that the loss should be paid out of premiums due to the underwriter in the broker's hands, that would be an answer to the claim of the assured.

Airey v. Bland, Park. Ins. (7th ed.) 36; Dalzell v. Mair, 1 Camp. 532; De Gaminde v. Pigou, 4 Taunt. 247; and vide Glennie v. Edmunds, Ibid. 775; 12 East, 507; 4 Taunt. 247.

The cases as to set-off between the underwriter and the insurance-broker are very numerous; most of them arise upon claims by brokers, in actions brought against them for premiums, to stand in the situation of principals, and to set off sums due from the underwriters for losses or for returns of premium. In the earlier cases on the subject, great stress was laid upon the circumstance of the broker guaranteeing the losses to the assured, in consideration of a *del credere* commission; but the courts have since held, that this circumstance is a matter entirely between the broker and his principal, and cannot confer upon the former any rights against third parties. And the more recent decisions (*a*) rest on the sounder ground of the character in which the broker appears in effecting the insurance, viz., whether he appear as principal or as agent. The result of the cases seems to be, that where the broker effects the insurance in the *name of his principal*, the broker appears merely as an agent, he is so considered by the underwriter, and consequently is not entitled to the rights of a principal: he cannot sue on the policy in his own name, and cannot, in an action against him for premiums, set off sums due for losses; and this, whether he acts under a *del credere* commission or not: but that, where the policy is effected in the *broker's name*, he there appears as a principal, he may sue in his own name, and is entitled to the right of set-off, provided he *has an interest*; which interest may be acquired either by his guaranteeing the losses to his principal for *del credere*, or by his advancing money on the goods insured.

Grove v. Dubois, 1 Term. R. 112; Bize v. Dickason, Ibid. 287; Cumming v. Forrester, 1 Maul. & S. 494; Koster v. Eason, 2 Maul. & S. 112; Parker v. Beasley, Ibid. 423; Morris v. Cleasby, 4 Maul. & S. 566; Baker v. Langhorn, 6 Taunt. 519; Davies v. Wilkinson, 4 Bing. 573. (*a*) The decision of Lord Ellenborough, in Wienholt v. Roberts, 2 Camp. 586, at first appears irreconcilable with the cases in the margin; but the report does not state whether the policy was in the name of the broker or of the assured: if it were in the name of the *broker*, that case is not at variance with the others.

Where the policy is effected in the name of the principal, and not of the broker, the circumstance of the broker's guarantee of the underwriter's solvency being *inserted in the policy* will not take the case out of the above principle, so as to enable the broker to set off a loss against the underwriter's claim for premiums.

Peele v. Northcote, 7 Taunt. 478; 1 Moo. 178.

The loss, in order to be set off under the statutes of set-off, must be *adjusted* before the commencement of the action; for until adjustment it is unliquidated damages, and not a *debt due*.

Cumming v. Forrester, *ubi sup.* Wienholt v. Roberts, 2 Camp. 586. *β*In an action upon a policy of insurance, judgment was delayed in order that the defend-

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ants might bring a cross-action for the premium, without prejudice, however, to the lien on such judgment for the fees of the plaintiff's attorney. *Ocean Ins. Co. v. Rider*, 22 Pick. 210. See *Adams v. Manning*, 17 Mass. 178.*g*

But in case of the bankruptcy of the underwriter, if his assignees bring an action for premiums, the broker may set off an *unadjusted* loss, not as a set-off but as a *mutual credit* between the bankrupt and the defendant, within the 5 G. 2, c. 30, § 28; for mutual credit *ex vi termini* includes unliquidated damages.

Bize v. Dickason, 1 Term R. 287; *Koster v. Eason*, *Parker v. Beasley*, *ubi supra*; and vide tit. *Bankrupt*, vol. i., and the clause as to mutual credit in the present bankrupt act, 6 G. 4, c. 16, § 50. β The statute for setting off mutual debts against each other is not applicable to goods or other specific property wrongfully detained. *Jarvis v. Rogers*, 15 Mass. 389.*g*

The deductions by the insurance broker, for returns of premium due from the underwriter, do not strictly fall under the denomination of set-off; they are not so much cross-demands as deductions to be made in certain events from the premium stipulated. While the premium is in the broker's hands, he is held to be the agent both of the underwriter and assured: of the former, for paying over the premium, and of the latter, for adjusting and settling a return of premium: and if, while this double agency continues, and before any action commenced by the underwriter, the broker has notice of the event which entitles the assured to a return, he may deduct such return from the amount claimed by the underwriter.

Shee v. Clarkson, 12 East, 507. β *Cleveland v. Clap*, 5 Mass. 201; *Livermore v. Newburyport Ins. Co.*, 2 Mass. 232; *Dodge v. Union Marine Insurance Company*, 17 Mass. 471.*g*

β The assignee of a policy of insurance takes it subject to the equity which existed, as between the parties, before the assignment.

Gourdon v. Insurance Company of North America, 3 Yeates, 327; *Rousset v. Insurance Company of North America*, 1 Binn. 429.*g*

But where the bankruptcy of the underwriter intervenes, his assignees are entitled to the whole premium in the broker's hands, and he cannot against them deduct the returns; and this, whether the events have happened before or after the bankruptcy, for the bankruptcy determines the agency of the broker. And the executors of a deceased underwriter stand in the same situation in this respect as the assignees of one who is bankrupt; for the death determines the broker's agency as well as the bankruptcy.

Minet v. Forrester, 4 Taunt. 541; *Goldschmidt v. Lyon*, *Ibid.* 534; *Parker v. Smith*, 16 East, 382; *Houston v. Robertson*, 6 Taunt. 448.

It was formerly holden, that the statutes of set-off did not extend to assignees of a bankrupt; but this doctrine is now overruled, and the statutes are held clearly to apply in cases of bankruptcy. And besides the statutes of set-off, it is enacted by the 6 G. 4, c. 16, § 50, (which consolidates and amends the provisions of 5 G. 2, c. 30, § 28, and 46 G. 3, c. 135, § 3,) "That where there hath been *mutual credit* given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt shall be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him: (a) and what shall appear to be due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively: and every debt or demand hereby made provable

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against the estate of the bankrupt, may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice (b) of an act of bankruptcy by such bankrupt committed." The term *mutual credit* in this statute is more comprehensive than the term *mutual debts* in the statutes of set-off; and under it sums may be set off which had not become actually due at the time of the bankruptcy. So also, may unliquidated damages for the breach of a contract; and the trust and credit given need not be of money on both sides, but if one party intrusts the other with *goods* or *value*, it will equally fall within the statute.

Ryal v. Larkin, 1 Wils. 155; Cowp. 133; {1 Johns. Ca. 51; Johnson v. Bloodgood, 2 Cain. Er. 303, S. C.;} 6 G. 4, c. 16, § 50; 1 P. Will. 325; 4 Term R. 24; 7 Term R. 380; 5 Taunt. 56; 1 Maul & S. 499. *Sed vide* 2 Bro. & B. 89; 5 Taunt. 56; 5 Barn. & A. 861; 2 Moo. 547. (a) The proviso of 46 G. 3, c. 135, § 3, that the credit must have been given *two months before* the commission, is here omitted, so that the account may now be taken down to the commission. (b) The notice now must be of an act of bankruptcy. Under the former acts, notice of *insolvency*, or of *having stopped payment*, would suffice.

The debt or credit must, under the old statutes, have existed between the bankrupt and the defendant at the time of the bankruptcy; a note endorsed by the bankrupt to the defendant after the bankruptcy could not be set off; but the defendant must show that such note was endorsed to him, or, if payable to bearer, that it came into his possession, *before* the bankruptcy. But the language of the present act is materially different, and debts and credits are by it expressly made the subject of set-off, notwithstanding the credit be given or the debt contracted *after* an act of bankruptcy, provided that the party had not *notice* of such act of bankruptcy.

2 Stra. 1231; 6 Term R. 57; 6 Taunt. 517; 4 Taunt. 888. *Vide* further, as to mutual credit, tit. *Bankrupt*, vol. i.; and as to set-off of costs, see Tidd's Prac. 1028, (8th ed.)|| *β*Gaylord v. Couch, 5 Day, 223.*g*

As in cases of bankruptcy the debt claimed to be set off must ||formerly|| have existed at the time of the bankruptcy, so in other cases it must be in existence at the commencement of the suit, and must be so pleaded. If it were then in existence, the defendant's right to set it off cannot be affected by his having brought an action upon it, in which he has recovered a verdict (a) or the plaintiff has paid the money into court. Hence a judgment may be pleaded by way of set-off pending a writ of error upon it.

Evans v. Prosser, 3 Term R. 186; Baskerville v. Brown, 2 Burr, 1229; Reynolds v. Burling, M. 25, G. 3, B. R., 3 Term R. 188; {1 Bin. 158; 1 Cain. 71; 1 Johns. Rep. 285; 3 Dall. 505; Peake, N. P. 210.} ||(a) For, in such case, it is the fault of the plaintiff in bringing an action for debt, which he might have set off in the former action against himself. Where the defendant gives notice of a set-off, and does not appear at the trial to give evidence of it, the plaintiff may either take a verdict for the whole sum, subject to be reduced to the balance really due, on the defendant's entering into a rule not to sue for the set-off; or he may take a verdict for the lesser sum, with an endorsement on the *postea*, to ground a motion for stay of proceedings if an action should afterwards be brought for the set-off. Laing v. Chatham, 1 Camp. R. 251; and see 1 Chit. R. 178.||

β A set-off cannot be, except against the plaintiff on the record.

Johnson v. Bridge, 6 Cowen, 693; Wolfe v. Washburn, 6 Cowen, 261; M'Donald v. Neilson, 2 Cowen, 239; Prior v. Jacobs, 1 Johns. Cas. 169.

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But, it seems, that if the plaintiff is merely an agent or trustee, the defendant may set off a debt due from the principal or *cestui que trust*.

Caines v. Brisban, 13 Johns. 9 ; 5 Cowen, 231.

If goods be delivered without payment, the purchaser may set off against the seller.

Chapman v. Lathrop, 6 Cowen, 110.

If a person purchase goods from a factor, knowing him to have made the sale in that capacity, in an action by the factor for the price of the goods, the defendant cannot set off a demand which he may have against the plaintiff.

Browne v. Robinson, 2 Caines' Cas. Err. 341. But, it seems, if the defendant have a claim against the principal, he may set it off. Caines v. Brisban, 13 Johns. 9.

A set-off existing against a bank when it stops payment is allowable, whether the debt be then payable, or to become due afterwards.

Bryan v. The Receiver of the Mid. Dist. Bank, 9 Cowen, 409.

Promissory notes purchased after a voluntary assignment by an insolvent for the benefit of his creditors, cannot be set off in an action brought in the name of the insolvent by such assignees, although the notes were due at the time of the purchase.

Iagerman v. Hyslop, Anth. N. C. 198, n. a. See Mead v. Gillett, 19 Wend. 397.

Under the bankrupt laws of the United States a joint debt may be set off against the separate claim of the assignee on one of the partners.

Tucker v. Oxley, 5 Cranch, 34.

In Virginia, in an action by the assignee of a negotiable promissory note against the maker, the latter may set off a negotiable note of the assignor which he held at the time of receiving notice of the assignment of his own note, although this set-off was not due at the time of the notice, but became due before the note upon which the suit was brought.

Stewart v. Anderson, 6 Cranch, 203.

The maker of a note negotiable at a particular bank, authorizes the bank to advance on his credit, to the owner of the note, the sum expressed on its face, and he cannot set off against the note any claim arising from transactions between the parties.

Mandeville v. The Union Bank of Georgetown, 9 Cranch, 9.

In a foreign attachment process, a trustee may set off against a debt or claim due from him to the debtor, any claim he has against the debtor, which he could set off in an adverse suit at law, brought against him by the debtor himself.

Picquet v. Swan, 4 Mason, 443.

In an action by executors or administrators, the defendant may set off a debt due to him by the testator or intestate, and the balance only shall be recovered.

McDonald v. Webster, 2 Mass. 498 ; Adams v. Butts, 16 Pick. 343. See Crist v. Brindle, 2 Rawle, 121.

In an action against one partner for a debt due by the partnership, a receipt given by the plaintiff to the defendant for goods, may be set off.

Purviance v. Sutherland, Addis. 291.

One of several partners, who is sued for a separate debt of his own, may

(D) Plea, Notice, and Particulars of Set-off.

set off a debt due by the plaintiff to the firm, when the plaintiff is insolvent and the set off is made with the consent of the other partners.

Wrenshall v. Cook, 7 Watts, 463.

A surviving partner, sued as such, may set off a debt due to him in his individual capacity by the plaintiff.

Lewis v. Culbertson, 11 Serg. & R. 48. See M'Dowell v. Tyson, 14 S. & R. 300.

Where a joint action is brought by several plaintiffs against one defendant, he cannot set off a claim due to him by one of the plaintiffs.

Archer v. Dunn, 2 Watts & Serg. 327. See Bell v. Cowgill, 1 Ashm. 8.g

(D) Where the Defendant must plead a Set-off, and where he may give Notice of Set-off; and herein of the Form of each, ||and of Particulars of Set-off.||

WE have seen in the above clauses of the statute of 8 G. 2, c. 22, that where either of the debts accrues by reason of a specialty, the debt intended to be set off must be pleaded in bar; and the defendant in his plea must aver what is really due; which averment is traversable.

Symmons v. Knox, 3 Term R. 65.

§ The precise sum was not stated in the plea of set-off, but left in blank, but there was an allusion to the demand of the plaintiff; it averred that the plaintiff was indebted to the defendant in a greater sum. Held, sufficient, for if the defendant had alleged a particular sum, he would not have been bound to prove it.

Crump v. Hubbard, Lit. Sel. Cas. 222.

Where the plaintiff contracted to do certain work for the defendant at a fixed price, but a part of it was afterwards done and paid for by the defendant, held, that it was matter of deduction, and admissible under the plea *nunq. indeb.*, and need not be pleaded as a set-off.

Turner v. Davis, 2 Man. & Gr. 241.g

In all other cases, the defendant may either plead or give notice of set-off, at his election.

2 Burr. 1231; Bull. N. P. 179. § In New York, a set-off cannot be pleaded. It must be by notice with the general issue. Williams v. Crary, 5 Cowen, 368; Livingston v. Romaine, Anth. N. P. 146, n. a; Caines v. Brisbane, 13 Johns. 9.g

{ In an action for money had and received, the defendant is entitled to a deduction for an allowance for his services in suing for and recovering the money, without pleading or giving notice of it as a set-off. It is not in the nature of a cross demand or mutual debt; but is a charge which makes the sum received for the plaintiff's use so much less.

4 Burr. 2133, Dale v. Sollet.

So if it is agreed by a policy of insurance, that the premium due shall be deducted out of any loss claimed, the premium will be set off against the amount of the loss.

2 Mass. T. Rep. 232, Livermore v. Newburyport Marine Ins. Co.}

|| But if he pleads any other plea besides the general issue, he must plead his set-off, and cannot give a notice.

Webber v. Venn, 1 Ry. & Moo. 413; *sed vide* Coulson v. Jones, 6 Esp. Ca. 50; Tidd, 720, (8th ed.)||

If, at the time of the action brought, a larger sum was due from the plaintiff to the defendant, than from him to the plaintiff, the action being barred, it seems more proper to plead the set-off; and it is usually

(D) Plea, Notice, and Particulars of Set-off.

pleaded in country causes to save the trouble and expense of proving the service of a notice. But, where the sum intended to be set off is less than that for which the action is brought, a notice of set-off should be given.

Bull. N. P. 179 ; Tidd's Pr. 406—7.

The several parts of a plea of set-off are as several counts in a declaration ; so that if one part be good, a demurrer to the whole plea is bad.

Dowland v. Thompson, 2 Bl. R. 910.

The notice of set-off should regularly be given with or at the time of pleading the general issue. Though if it be not then given, the court will permit the defendant to withdraw the general issue, and plead it again with a notice of set-off. And such notice may be given with the general issue, after the defendant has been ruled to abide by his plea.

Tidd's Pr. 720, (8th ed.) ; 2 Str. 1267 ; 1 Term R. 634, *in notis*.

|| The plea of *non est factum* in covenant, is not a general issue within the meaning of the statute, and therefore a notice of set-off cannot be given with it.

Oldershaw v. Thompson, 5 Maul & S. 164. *β*In Ohio, under the statute, *non est factum* is a plea of general issue in covenant, to which a notice of set-off may be appended. Granger's Administrator v. Granger. 6 Ohio, 41.*g*

If a set-off is pleaded of money due on a recognisance, and of other money due on a simple contract, a replication protesting the recognisance, and replying *non debet modo et formâ*, and concluding to the country, is bad ; inasmuch as it refers matter of record to a jury.

Solomons v. Lyon, 1 East, R. 369.

In debt on bond, a plea of set-off for money due on a recognisance, and also for money due on simple contract, pleaded as to an action *upon promises*, is a nullity, and the plaintiff may sign judgment.

Penfold v. Hawkins, 2 Maul. & S. 606.

To a plea of set-off in *assumpsit* for goods sold, it is not a good replication that it was agreed the goods should be paid for in ready money ; but in estimating the plaintiff's damages, the jury are to consider the loss sustained by the non-payment in ready money.

Eland v. Karr, 1 East, R. 375 ; Cornforth v. Rivett, 2 Maul. & S. 510.

The plaintiff cannot, on the issue on *non-assumpsit*, make use of the defendant's notice of set-off as evidence of an admission of the debt due ; for it is in the nature and place of a plea, and the admission of a fact in one plea is not evidence against the defendant on the issue on another plea, wherein the defendant denies the fact.

Harrington v. Macmorris, 5 Taunt. 228.||

In point of form, the notice should be almost as certain as a declaration : therefore, where the notice of set-off was in these words, "Take notice that you are indebted to me for the use and occupation of an house, for a long time held and enjoyed, and now lately elapsed ;" this was holden insufficient : (*a*) and it afterwards appearing, that the debt intended to be set off was rent reserved on a lease by indenture, which was not mentioned in the notice, the Chief Justice said, it was bad on that account also ; for if this had been shown, the plaintiff might probably have proved an eviction, or some other matter to avoid the demand.

Fowler v. Jones, Bull. N. P. 179 ; ||and see Ord v. Ruspini, 1 Esp. Ca. 569.] (*a*) But, note, this was before the statute 11 G. 2, c. 19, which gives the action for use and occupation.

(E) Of the Effect of Set-off.

¶As the defendant is allowed to call for the particulars of plaintiff's demand, so when the defendant pleads or gives a notice of set-off, the plaintiff may take out a summons for the particulars, upon which the judge will make an order, which should be regularly drawn up and served, (a) for the defendant to deliver them in a certain time; or in default thereof, that he be precluded from giving evidence at the trial in support of his set-off. (b) Under a judge's order for particulars, the defendant, or his attorney or agent, should deliver a particular account in writing of the items of the demand, and when and in what manner it arose. And where there has been an account current, and payments have been made for which the party means to give credit, the particular ought to contain, as well those matters for which he means to give credit, as those for which the action is brought. (c) But it is sufficient to refer, in a bill of particulars, to an account already delivered, without restating it; (d) and in general, if the plaintiff's particular convey the requisite information to the defendant, however inaccurately it be drawn up, it is sufficient. (e) And if a bill of particulars state the transaction upon which the plaintiff's claim arises, it need not state the technical description of the right which results to the plaintiff out of the transaction. (g) The above rules apply to particulars of set-off, as well as to particulars of plaintiff's demand.

(a) R. H. 59 G. 3, K. B. (b) For the form of particulars of set-off, see Tidd, Appendix, ch. 24, § 10; and for their effect, see 8 Price, 213. (c) 1 Esp. Ca. 280; 2 Camp. 410; *sed vide* Tidd, 644, note, (8th ed.) (d) Peake's Ca. 172. (e) 1 Camp. 69, *in notis*. (g) 4 Taunt. 189; and see Tidd, *supi sup.*¶

β(E) Of the Effect of a Set-off.

WHERE a party in the defence of a suit sets up matter on the trial of the cause which is not properly available as a defence, as, where he insists upon matter as set-off which is not available as such, and testimony is produced in support of such defence, and submitted to and passed upon by the jury, such matter cannot again be brought up in a suit by such defendant, and, if it be, the former suit and trial may be pleaded in bar of a recovery.

Wilder v. Case, 10 Wend. 503.

By filing an account by way of set-off or cross demand, commencing within six years, a defendant does not thereby waive the statute of limitations, as to so much of the plaintiff's account as is of more than six years' standing.

Hibler v. Johnston, 3 Harr. (N. J.) R. 266.

A set-off may be withdrawn before judgment upon it, and a separate action may be maintained for it.

Cary v. Bancroft, 14 Pick. 315; Muirhead v. Kirkpatrick, 5 Watts & Serg. 506.

Where a verdict was given against the plea of set-off, and the defendant afterwards brought an action for such cause of action, held, that he was estopped from suing for the same demand, and a plea stating such former action and the second action was for the recovery of the identical claim specified in the set-off, was not answered by a replication that no evidence was offered to substantiate the plea of set-off.

Eastmore v. Laws, 5 Bing. N. S. 444; S. C. 7 Dowl. 431.g

SHERIFF.

-
- (A) The Nature of his Office.
- (B) Who are qualified or exempt from serving.
- (C) Manner of appointing him; and herein, of his Oath.
- (D) That he must attend the Office singly, and cannot execute any other.
- (E) How long to continue in his Office, and by what determined.
- (F) That he must be resident in his County, and whether he hath any Jurisdiction out of it.
- (G) Cannot dispose of his Bailiwick.
- (H) Of the High-Sheriff's Power and Duty in appointing an Under-Sheriff and other Deputies: And herein,
1. *Of the Under-Sheriff, and in what Manner appointed.*
 2. *Of Covenants between the High-Sheriff, his Under-Sheriff, and other Officers.*
 3. *Of acts that may be done by either of them, or where the High-Sheriff must himself be personally present.*
 4. *The Manner of approving Bailiffs and other Officers, and therein of his being answerable for their acts.*
 5. *Of his Jurisdiction over Jails and Jailers.*
- (I) Of the preceding and succeeding Sheriff; and herein, of the Acts necessary to be done by each of them.
- (K) Where more than one Sheriff.
- (L) Of his Duty and Acts as a Judicial Officer.
- (M) Of his Duty and Acts as a Ministerial Officer: And herein,
1. *That he is the proper Officer to execute all Writs, except in cases of Partiality.*
 2. *That he cannot dispute the authority by which they issue, nor any Irregularity in them.*
- (N) How he is to execute such a writ: And herein,
1. *That it must be without Favour or Oppression, and after such a Writ is actually taken out, and before it is returnable.*
 2. *Of his raising the Posse Comitatus.*
 3. *Of breaking open Doors.*
 - ||4. *Where and when he can execute the Writ.||*
 5. *Whether he can execute his Writ on a Sunday.*
 6. *In what Manner he is to do Execution. ||And herein of the several Writs of Execution, and what may be seized under each.||*
- (O) || Of his Duty on Arrests: And herein,||
1. *Of his Duty in admitting Persons to Bail; and of Securities taken for Ease and Favour.*
 - ||2. *Of his Duty and Liability in returning the Writ, and bringing in the Body.||*
- 3(P) Of actions by and against the Sheriff.g
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(A) The nature of his Office.

It seems that anciently the government of the county was by the king lodged in the earl or count, who was the immediate officer to the crown; and this high office was granted by the king at will, sometimes for life, and

(A) The Nature of his Office.

afterwards in fee. But, when it became too burdensome, and could not be commodiously executed by a person of so high rank and quality, it was thought necessary to constitute a person duly qualified to officiate in his room and stead, who from hence is called, in Latin, *Viccomes*, and Sheriff from Shire Reeve, i. e. governor of the shire or county. He is likewise considered in our books as bailiff to the crown; and his county, of which he hath the care, and in which he is to execute the king's writs, is called his bailiwick.

Dav. 60. Savil, 43; Roll. Rep. 274; Co. Lit. 168 a. Vide Pref. to 9 Rep., 7 Co. 33.

It is said by Lord Coke and Dalton, that earls, by reason of their high employments and attendance upon the king, being not able to follow all the business of the county, were delivered of all that burden, and only enjoyed the honour as they now do, and that labour was laid upon the sheriff; so that now the sheriff doth all the king's business in the county. And the sheriff, though he be still called *viccomes*, yet all he doth, and all his authority, is immediately from and under the king, and not from or under the earl; so that at this day the sheriff hath all the authority for the administration and execution of justice which the count or earl had; the king, by his letters patent, now committing to the sheriff *custodiam com'*.

9 Co. 49; Dalt. Sh. 2. ||See more as to the *Comes* and *Viccomes*, Seld. tit. *Hon.* part 2; Madox. Notes, Dial. Exch. p. 31.||

He is therefore at this day considered as an officer of great antiquity, trust, and authority, having, as Mr. Dalton observes, from the king the custody, keeping, command, and government (in some sort) of the whole county committed to his charge and care; and, according to my Lord Coke, he is said to have *triplicem custodiam*, viz., *vita justitiæ*, *vita legis*, *et vita reipublicæ*, &c.; *vita justitiæ*, to serve process, and to return indifferent juries for the trial of men's lives, liberties, lands, and goods; *vita legis*, to execute process and make execution, which is the life of the law; and *vita reipublicæ*, to keep the peace.

Co. Lit. 168; Dalt. Sh. 5.

It seems that anciently, (a) and before the statute 9 Ed. 2, stat. 2, sheriffs were elected by the freeholders of the county, as the coroners are at this day, and consequently that their office did not determine by the death of the king.

2 Inst. 558; 2 Brownl. 282; ||Mad. Notes, Dial. Exch. p. 33; Spelm. Gloss. voc. *Viccomes*; Barr. on Stat. p. 185; ||but *qu.?* [(a) It was ordained by the statute of 28 E. 1, c. 8, that the people should have an election of sheriffs in every shire where the shrievalty is of inheritance. ||See 1 Black. Com. 340. ||For, anciently, in some counties the sheriffs were hereditary; as it seems they were in Scotland till the statute of 20 G. 2, c. 43, and still continue in the county of Westmoreland, of which the Earl of Thanet is the hereditary sheriff. The city of London, too, have the inheritance of the shrievalty of Middlesex vested in their body by charter. 1 Bl. Com. 339. ||But though the same persons are sheriffs of London and sheriff of Middlesex, yet a writ directed to them as sheriffs of London cannot be executed by them in Middlesex, and so *e converso*, 3 Barn. & A. 408: and a person in Newgate, in custody of the sheriffs of London, cannot be detained on a writ directed to the sheriff of Middlesex; for the prisons are distinct. 1 Roll. Abr. 894. ||This office may also descend to and be executed by a female; for Anne Countess of Pembroke had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes of Appleby she sat with the judges on the bench. Hargr. Co. Lit. 326.]

And though at this day the king hath the sole appointment of sheriffs, (b) except in counties palatine, and where there are *jura regalia*, yet it hath been (c) adjudged, that the office of sheriff is an entire thing, and

(B) Who are qualified or exempt from serving.

therefore the king cannot apportion or divide it, he cannot determine it in part, as for one town or for one hundred; neither can he abridge the sheriff of any thing incident or belonging to his office.

(b) Dav. 60; (c) 4 Co. 33, Mitton's case; Dalt. Sh. 6; Hob. 13; Raym. 363.

|| Respecting the office of sheriff in ancient times, see Mr. Amos's note to Fortesc. de Laud. Leg. Angliæ, p. 81, and the books there cited.||

(B) Who are qualified or exempt from serving.

It is proved by several (a) acts of parliament, that no man shall be sheriff in any county, except he have sufficient lands within the same county where he shall be sheriff, whereof to answer the king and his people, in case that any person shall complain against him; and that none that is steward or bailiff to a great lord shall be made sheriff.

(a) 9 Ed. 2, stat. 2; 2 Ed. 3, c. 4; 4 Ed. 3, c. 9; 5 Ed. 3, c. 4; 14 Ed. 3, stat. 1, c. 7. β Where the constitution requires a property qualification in a sheriff, and, to make him eligible, land is conveyed to him, this is a fraud upon the policy of the law. *Roberts v. Gibson's Executors*, 6 Harr. & Johns. 128.g

It is holden, that the king hath an interest in every subject, and a right to his service, and that no man can be exempt from the office of sheriff but by act of parliament or letters patent.

Sav. 43; 9 Co. 46.

And on this foundation it was adjudged in *Sir John Read's case*, who was made high-sheriff of Hertfordshire at the time he was excommunicated for non-payment of alimony, that an information properly lay against him for not executing the office; though it was objected on his behalf, that the oath and sacrament enjoined by act of parliament, (b) are necessary qualifications for all sheriffs, which he was disabled to take by reason of the excommunications; but the court held that he was punishable for not removing the disability, it being in his power to get himself absolved from the excommunication, and that therefore it could be no excuse.

2 Mod. 299, *Attorney-general v. Sir John Read*. ||(b) 25 Car. 2, c. 2, now repealed by 9 G. 4, c. 17 as to receiving the sacrament; and see in § 2, the declaration to be made in lieu of the sacramental test.||

And though in the above case it was admitted, that the subject was bound to serve the king in such capacity as he is in at the time of the service commanded, yet it was insisted upon that he was not obliged to qualify himself to serve in every capacity; and that therefore a prisoner for debt is not bound or compellable to be sheriff, no more than a person is bound to purchase lands to qualify himself to be either a coroner or a justice of the peace. It was likewise said, that by the statute 3 Jac. 1, c. 5, every recusant is disabled; and though he may conform, he is not bound to it; for if he submits to the penalty, it is as much as is required by law.

2 Mod. 301.

An information was exhibited against L for refusing to take upon him the office of sheriff of Norwich, who pleaded the statute 13 Car 2, st. 2, c. 1, § 12,* (c) by which it is enacted, that a person elected to any office in a corporation shall be such as within one year before hath taken the sacrament according to the church of England, else the election shall be void; and averred that he had not taken the sacrament, &c., at any time within the election of him to be sheriff, &c., wherefore the election

(B) Who are qualified or exempt from serving.

was void. The attorney-general replied, and set forth that part of the act of uniformity, by which every person is obliged to take the sacrament three times in the year, according to the liturgy, &c.; the defendant rejoined, and set forth the statute of 1 W. & M., c. 18, for tolerating dissenters; and on demurrer it was adjudged, that the defendant's rejoinder was a departure from his plea, and therefore he could have no advantage of the act of toleration, supposing it was for his purpose, it being a private statute, *(d)* and therefore to be pleaded. And though judgment was given principally on this point, yet all the court, except Justice Sam. Eyre, *(e)* held, that this case was not within the meaning of the toleration act, which was not made in favour of dissenters, but the contrary, and was rather to exclude them from beneficial offices than to ease them of offices of charge.

Carth. 306; Salk. 167, pl. 1; Ld. Raym. 29; Skin. 574, pl. 1; 4 Mod. 269, The King and Queen v. Larwood. * See now 5 G. 1, c. 6, § 3, and 11 G. 1, c. 4 § 6. || *(c)* Now repealed by 9 G. 4, c. 17, as to taking the sacrament; and see 10 G. 4, c. 7, § 10 & 14, by which Roman Catholics may hold civil and military offices, and be members of corporations, and hold offices therein, upon taking the oaths therein set forth, instead of the oaths of allegiance, supremacy, and abjuration. || *((d))* It is now declared to be a public act by 19 G. 3, c. 44. *(e)* It was said at the bar that the Lord Keeper was of the same opinion with Mr. J. Eyre.]

[Four years before, M. 2 W. & M., this was adjudged as a good plea, in the case of Guilford Town v. Clarke, viz., that he being a dissenter, and unqualified by the act, the election was void; and that the bye-law for forfeiting 20*l.* upon refusal after election did not take place, because the person being absolutely incapacitated by the statute, there was really no election; and so he could not refuse after election.

2 Vent. 247; Gibs. 506.

The defendant was one of the dissenters who was chosen sheriff of London and Middlesex, and refused to take upon him the office; for which an information was moved against him, as it is an office in which the public are interested, and therefore not to be compensated by a pecuniary satisfaction to the city. But, upon showing cause, the court discharged the rule: it appeared there were acts of common council that had provided penalties upon refusers, which is the proper remedy; especially where it is doubtful, whether the refusal is a crime or not, which hath never yet been settled. In this case, the facts are agreed, and the only doubt is in point of law, and therefore more proper for a civil suit: and so was the opinion of the court, in the case of Shackleton of York, in Lord Hardwicke's time. However, they declared, that if, after the point was determined against the dissenters, others should refuse, it might be a foundation to move for an information.

Rex v. Grosvenor, 2 Stra. 1193.

But this much agitated question, concerning the fining of dissenters for not serving corporation offices, is now settled.—In the year 1748, the corporation of London made a bye-law, imposing a fine of 600*l.* upon every person, who, being elected, should refuse to serve the office of sheriff. An action was brought in the sheriff's court upon this bye-law, for the penalty of 600*l.* against the defendant Allen Evans. for refusing to serve the said office. The defendant pleaded the statute of 13 Car. st. 2, c. 1, *(a)* that no person shall be chosen into such office, who shall not, within one year next before, have taken the sacrament according to the rights of

(B) Who are qualified or exempt from serving.

the church of England; and in default thereof, every such choice is declared to be void. The defendant further pleaded the statute of 1 W. & M. c. 18, for excepting protestant dissenters from penalties contained in former acts. Then the plea averred, that the sheriffs of London are officers who, before 13 Car. 2, were persons bearing such office: that the defendant was and still is a protestant dissenter from the church of England, a person of a scrupulous conscience in the exercise of religion, and during all that time has and still does frequent the congregation of religious worship among protestant dissenters. The defendant then stated that he took the oaths and subscribed the declaration, according to the act of toleration, in the year 1751, at the sessions holden for the county of Middlesex; and that his taking the oaths was duly registered in the court of sessions: that he had not within one year before the supposed election taken the sacrament of the Lord's Supper according to the rites of the church of England, nor has he at any time since done it, nor was he bound to take the same since May, 1751: that of these premises the lord mayor, aldermen, and citizens had notice; and that by reason thereof, and of the act of parliament made for governing corporations, the mayor, aldermen, and citizens assembled in July, 1754, and the livery were prohibited from electing, and had no power to elect him sheriff: that he was disabled from, and incapable of being elected, and that the supposed election of him was void. To this plea the plaintiff replied, that by the statute of 5 Geo. 2, c. 6, § 3, it is enacted, that no person chosen into such office shall be removed or otherwise prosecuted for omission of taking the sacrament, nor shall any incapacity or disability be incurred by reason of the same, (unless he be removed or prosecution commenced within six months.) To this replication the defendant demurred; and the plaintiff joined in demurrer. And judgment was given for the plaintiff in the sheriff's court; which was afterwards affirmed in the court of the Hustings. But this judgment was reversed by the commissioners, delegates, viz., Lord Chief Baron Parker, Mr. Justice Foster, Mr. Justice Bathurst, and Mr. Justice Wilmot; and the judgment of the commissioners delegates was afterwards affirmed in the House of Lords. The house, when the matter was brought before them, ordered this question to be proposed for the opinion of the judges: How far the defendant might, in the present case, be allowed to plead his disability in bar of the accusation brought against him? It was allowed on all hands, that if his non-conformity and consequent disability was criminal, he could not plead it. And for this reason one of the judges, Perrot, B., was of opinion, (contrary to the rest of his brethren,) that the defendant's disability, in the present case, could not be pleaded, because, as he said, the toleration act amounted to nothing more than an exemption of protestant dissenters from the penalties of certain laws therein particularly mentioned; and the corporation act not being mentioned therein, the toleration act could have no influence upon it; and therefore his disability, incurred by his non-conformity in consequence of the corporation act, was, in his opinion, a culpable one, and rendered him liable to any penalties to which any others are liable for refusing to serve the office of sheriff; inasmuch as no man can disable himself; but if he refused to take the sacrament according to the rights of the church of England, he disabled himself, and the fine imposed was a punishment upon him for the crime of his non-conformity, from which he could plead no legal exemption.—But all the other judges were of a contrary opinion, that the corpo-

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ration act expressly rendered the dissenters ineligible and incapable of serving; its design being to keep them out, as persons at that time supposed to be disaffected to the government; and though the disability arising from hence could not *then* have been pleaded against such an action as is now brought against the defendant, non-conformity being *then* in the eye of the law a crime, and no man being allowed to excuse one crime by another; yet the case is different since the toleration act was enacted, that act amounting to much more than a mere exemption from the penalties of certain laws, and having an influence upon the corporation act consequentially, though the corporation act is not mentioned therein, by freeing the dissenters from all obligation to take the sacrament at church, abolishing the crime as well as penalties of non-conformity, and allowing and protecting the dissenting worship. The defendant's disability, therefore, they said, was a lawful one, a legal and reasonable, not a criminal excuse; it was not in the sense of the law disabling himself; the meaning of that maxim, "That a man shall not disable himself," being only this, that no man shall disable himself by his own wilful fault or crime; and non-conformity being no longer a crime since the toleration act was enacted, he is disabled by judgment of parliament, namely, by the corporation act, without the concurrence or intervention of any crime of his own; and therefore he may plead this disability in bar of the present action.

Harrison v. Evans, 2 Burn's E. L. 185; 6 Bro. P. C. 181. ||(a) Now repealed as to the sacramental test by 9 G. 4, c. 17; and see 10 G. 4, c. 7, as to the oath now required of Roman Catholics holding civil or military or corporate offices. || Furneaux's Letters to Blackstone.]

If a man is disabled by a judgment in law to bear an office, he is excused, *nam judicium redditur in invitum*; for though his fault or neglect was the occasion of such judgment, yet it is a mark set upon him by the government.

Salk. 168; 4 Mod. 273.

And as nothing but an invincible necessity can exempt a person from serving the office of sheriff, on this foundation a bye-law made in London, that no freeman chosen sheriff, &c., shall be excused, unless he voluntarily swears he is not worth 10,000*l.*, (a) &c., and if he openly refuse to take the office, then to forfeit the sum of 400*l.*, &c., was adjudged good.

Salk. 142, pl. 1; Ld. Raym. 496; Carth. 480; 5 Mod. 438; 12 Mod. 270, City of London v. Vanacre. ||(a) Now 20,000*l.*, by an act of the common council of 11th June, 1799. ||

[By the 9 Geo. 2, c. 9, § 3, any person elected sheriff of Norwich worth 3000*l.* may be excused serving the office on paying a fine of 80*l.* within fourteen days: but the fourth section provides, that no person shall be discharged from bearing the said office for any longer time than one year, without the consent of the mayor, sheriffs, and commonalty of the city. The defendant, who was worth 3000*l.*, had been regularly elected to the office, and had tendered his fine, on condition that he should be discharged from serving the office in future; but this was not accepted. On a motion for an information against him, the court were clearly of opinion, that the payment of the fine did not exempt the person paying it for more than a year, without the agreement of the corporation that he should be discharged for a longer time. And they granted an information against the defendant because the vacancy of the office occasioned a stop of public justice, and

(C) Manner of appointing, and his Oath.

the year would be nearly expired before an indictment could be brought to trial.

Rex v. Woodrow, 2 Term R. 731.]

β The election of an unqualified person as sheriff, is not *ipso facto* void, it is merely voidable.

State v. Anderson, Coxe R. 318.g

(C) Manner of appointing him; and herein, of his Oath.

THE high-sheriff hath his authority given him by two (a) patents; by the one, the king commits to him the custody of the county; by the other, the king commands all other his subjects within that county to be aiding and assisting to him in all things belonging to his office.

Dalt. Sh. 7. Where see the form of such patents. (a) As the sheriff is made by letters patent of record, if therefore it shall come in question, whether he be sheriff or not, it is to be tried by the record, or it may be tried by the examination of the sheriff. Dalt. Sh. 8; 9 Co. 31; Jenk. 90.—For the fees of his patent, vide 3 G. 1, c. 15.

By the statute of 9 E. st. 2, the chancellor, treasurer, and judges are to meet (b) *Crastino Animarum*, being the 3d of November, (c) every year, in Exchequer Chamber, to nominate persons to be made sheriffs. And the manner is, the Lord Chancellor, Treasurer, and other high offices, being of the privy council, together with the judges of both benches and the barons of the exchequer, being assembled in the Exchequer Chamber, nominate three persons in every county to be presented to the king, that he may prick one of them to be sheriff of every county.

Dalt. Sh. 6. (b) But it may be put off to another day. Cro. Car. 13, 595. (c) By 24 G. 2, c. 48, § 12, sheriffs are to be appointed on the morrow of St. Martin.

And yet the king by his prerogative may make and appoint the sheriffs without this usual assembly, and election or nomination in the Exchequer, as is the daily practice at this day upon the death of any sheriff.

Dyer, 225; Dalt. Sh. 6. [Vide 1 Bl. Comm. 341, and Mr. Christian's note.]

The sheriff, in every of the shires of Wales, shall be nominated yearly by the Lord President, council, and justices of Wales, and shall be certified up by them, and after appointed and elected by the king as other sheriffs are.

34 H. 8, c. 26; Dalt. Sh. 6. [By stat. 1 W. & M. c. 27, § 4, the nomination of three proper persons to be sheriffs of the Welch counties is now vested in the justices of the great sessions, who are to certify the names of such persons to the privy council *crastino animarum*, that the king may appoint out of them.]

The sheriff, before he doth exercise any part of his office, and before his patent is made out, is to give security in the King's Remembrancer's office in the Exchequer, under pain of 100*l.*, for the payment of his profers, and all other profits of his sheriffwick. But these securities are never sued, unless there is a deficiency in the sheriff's effects.

Dalt. Sh. 7

The sheriff, before he takes upon him the exercise of his office, must not only take the oaths of allegiance and abjuration enjoined all officers by divers acts of parliament, but likewise a particular oath of office, which is (d) said to be by the ancient common law, and contains a concise account of the nature and several branches of his office. This ancient oath is set down in Dalton, 9.

Dalt. Sh. 9. (d) Dyer, 165

(C) Manner of appointing, and his Oath.

But there being in this oath some things which were thought too (a) strict with respect to sheriffs, instead thereof it is now enacted by the 3 G. 1, c. 15, § 18, that the following oath shall be taken by all high-sheriffs, except the sheriffs of Wales and of the county palatine of Chester, (b) &c., viz., "I, A B, do swear that I will well and truly serve the king's majesty in the office of sheriff in the county of ———, and promote his majesty's profit in all things that belong to my office as far as I legally can or may. I will truly preserve the king's rights, and all that belongeth to the crown. I will not assent to decrease, lessen, or conceal the king's rights, or the rights of his franchises; and wheresoever I shall have knowledge that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchises, suits, or services, or in any other matter or thing, I will do my utmost to make them be restored to the crown again; and, if I may not do it myself, I will certify and inform the king thereof, or some of his judges. I will not respite or delay to levy the king's debts for any gift, promise, reward, or favour, where I may raise the same without great grievance to the debtors. I will do right as well to poor as to rich, in all things belonging to my office. I will do no wrong to any man for any gift, reward, or promise, nor for favour or hatred. I will disturb no man's right, and will truly and faithfully acquit at the Exchequer all those of whom I shall receive any debts or duties belonging to the crown. I will take nothing whereby the king may lose, or whereby his right may be disturbed, injured or delayed. I will truly return and truly serve all the king's writs according to the best of my skill and knowledge. I will take no bailiffs into my service but such as I will answer for, and will cause each of them to take such oaths as I do in what belongeth to their business and occupation. I will truly set and return reasonable and due issues of them that be within my bailiwick, according to their estate and circumstances, and make due panels of persons able and sufficient, and not suspected or procured, as is appointed by the statutes of this realm. I have not sold or let to farm nor contracted for, nor have I granted or promised for reward or benefit, nor will I sell or let to farm, nor contract for or grant for reward or benefit by myself or any other person for me, or for my use, directly or indirectly, my sheriffwick or any bailiwick thereof, or any office belonging thereunto, or the profits of the same, to any person or persons whatsoever. I will truly and diligently execute the good laws and statutes of this realm, and in all things well and truly behave myself in my office for the honour of the king and the good of his subjects, and discharge the same according to the best of my skill and power. So help me God."

(a) Vide Cro. Car. 26. Several exceptions taken by my Lord Coke to the additions made to the ancient oath, and annexed to the *dedimus* to swear him sheriff of Bucks. ¶ The four exceptions taken by Lord Coke were referred to the judges by the Lord Keeper at Reading, and the only exception allowed was to the clause requiring the sheriff to do diligence to destroy all heresies called Lollaries, and to be assistant to the commissions and ordinary, in church matters, which were added to the old oath by reason of the statutes 5 R. 2, and 2 Hen. 4, c. 15, against heretics, which statutes were repealed by the 1 Ed. 6, and the 1 Eliz. The judges gave their opinion, that it was fit the clause should be omitted, because it was appointed by statutes then repealed, and which were intended against the religion then professed and established, which before had been condemned for heresy, but was then held for the true religion. Cro. Car. 26. The other three exceptions were not allowed by the judges; and the substance of those clauses is introduced in the new oath under 3 G. 1, c. 15. ¶ [(b) The sheriffs of those places are to take the old oath, with the omission only of the words imposing constant residence in their bailiwicks. 3 G. 1, c. 15, § 20.]

(E) How long to continue in his Office, &c.

If a person refuses to take upon him the office of sheriff, it was usual to punish him in the Star-chamber; and he may now be proceeded against by information in the Court of King's Bench. Also, if he refuses to take the oaths enjoined him, or officiates in the office before he hath thus qualified himself, that court, which hath a general superintendency over all officers and ministers of justice, will grant an information against him. And it hath been (a) held, that a refusal of oaths enjoined to be taken, amounts to a refusal of the office.

Dalt. Sh. 15; Dyer, 167. (a) 3 Lev. 116; Carth. 307.

If the sheriff be not in London, the oath may be taken by *dedimus postestatem*, directed to any two justices of the peace of the same county, one to be of the *quorum*, or to any other commissioner or commissioners, or before one of the judges of assize for that county, or one of the Masters in Chancery, who, it is said, may as well as the judge administer such oath without any *dedimus*.

Dalt. Sh. 13, 14.

If the commissioners shall return the commission or writ, and the oaths to be taken when they were not taken, this is finable.

Dyer, 168; Dalt. Sh. 14.

It is held, that the breach or violation of this oath, although a high offence, is not however perjury, nor punishable as such.

11 Co. 98.

(D) That he must attend to this Office singly, and cannot execute any other.

It is holden, that a sheriff cannot be elected *knight* of the shire for that county for which he is sheriff.

4 Inst. 48; Lit. Rep. 326; Sir Simon Dewe's Journ. 38, 436.

And although a sheriff is by virtue of his office a conservator of the peace, yet it is enacted by the 1 Mar. st. 2, c. 8, § 2, "That no person having the office of sheriff of any county shall exercise the office of justice of the peace in any county where he shall be sheriff during the time he shall use the office of sheriff."

Dalt. Sh. 27.

By the 1 H. 5, c. 4, it is enacted, "That no under-sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, shall be attorney in any of the king's courts during the time that he is in office."

Dalt. Sh. 454.

||And by stat. 22 G. 2, c. 46, § 14, no clerk of the peace, or his deputy, nor any *under sheriff*, or his *deputy*, shall act as a solicitor, attorney, or agent, or sue out any process at any general or quarter sessions of the peace, to be held for any place where he shall execute his office, upon pain of forfeiting 50*l*.||

(E) How long to continue in his Office, and by what determined.

By the 14 E. 3, c. 7, it is enacted, "That no sheriff, (b) under-sheriff, nor sheriff's clerk, shall tarry or abide in his office above one year, upon pain to forfeit 200 pounds yearly as long as he occupieth the office; and that every pardon made for such offence or forfeiture shall be void; and all (c) letters patent made to occupy such office above one year shall be void, any words or clause of *non obstante* put into such patent notwithstanding; and

(F) Must reside in his County, and of his Jurisdiction.

that whosoever shall presume to take upon himself the office of a sheriff above one year by force of such letters patent, shall be disabled from ever after to be sheriff within any county of England."

Confirmed by the 23 H. 6, c. 8. (b) By the 42 E. 3, c. 9. (c) Notwithstanding this it hath been adjudged in the year-book, 2 H. 7, 6 b, that the king, by the clause of *non obstante*, might make a good patent of such office for life; and by the following authorities, which seem to be grounded on this resolution, it is said, that the king by his prerogative may dispense with these statutes, and grant the office of sheriff for years, life, or in fee. 7 Co. 14; Finch, 234; Plow. 502; Dalt. Sh. 22. But yet vide 2 Hawk. P. C. c. 37, where the contrary opinion is holden, and the reason of these authorities refuted; and stat. 1 W. & M. sess. 2, c. 2.

By the 1 Ric. 2, c. 11, it is enacted, "That none that hath been sheriff of any county a year shall be within two years next chosen again, or put in the same office, if there be other sufficient."

Confirmed by 23 H. 6, c. 8.

And by the 1 Hen. 5, c. 4, it is enacted, "That they that be bailiffs of sheriffs one year shall be in no such office by three years next following, except bailiffs of sheriffs which inherit in their office."

By the common law the patents of sheriffs, like all other commissions, determined by the death or demise of the king; but now by the 7 W. & M. c. 27, § 21, and 1 Ann. st. 1, c. 8, such commission shall remain in full force for the space of six months next after such death or demise, unless superseded, determined or made void by the next successor.

Dyer, 165; Dalt. Sh. 17.

But though such patent was determined by the death of the king, yet it was adjudged, that if the sheriff after such demise, and before his taking out a new patent, suffered a prisoner to escape, that an action lay against him.

7 Co. 30.

It hath been held, that the office of sheriff does not determine by the party's becoming a peer on the death of his father, but that he still remains sheriff *ad voluntatem regis*.

Cro. Eliz. 12, Sir Lewis Mordant's case.

(F) That he must be resident in his County, and whether he hath any Jurisdiction out of it.

By the 4 H. 4, c. 5, it is enacted, "That every sheriff shall be (a) dwelling in proper person within his bailiwick for the time he shall be such officer, and that the sheriff shall be (b) sworn to do the same."

(a) The word in the original is *demurrant*, which it is said is not well translated by the word *dwelling*. Lit. Rep. 328. (b) Is now left out of the new oath, || in 3 G 1, c. 15.||

Hence it is clear that a sheriff hath no jurisdiction in any other county, nor can he do a judicial act, in which his personal presence is required out of his county. But it is held, that he may do a (c) ministerial act, as make a panel, or return a writ out of his county.

Dalt. Sh. 22. (c) 9 H. 4, 1. [He may assign a bail-bond out of his county. 2 Ld. Raym. 1455; 2 Stra. 757.]

But, if the sheriff be beyond sea, and make a panel, or any return there, and send it into England, it is not good, for he is an officer but only in England.

Dalt. Sh. 22.

If, on a *habeas corpus*, &c., the sheriff is commanded to carry a prisoner

(G) Cannot dispose of his Bailiwick.

to a certain place out of his county, and in doing this he is obliged to go through several counties, to this special purpose he hath authority in these other counties.

Dalt. Sh. 23.

So, if a prisoner of his own wrong shall make an escape, and fly into another county, the sheriff or his officers upon fresh suit may take him again in another county.

Plow. 37; Dalt. Sh. 23.

¶ It has never been doubted that bailable process must be executed by the sheriff within his bailiwick; but it has been holden in some cases, that process not bailable might be served out of the county into which it is directed. However, it is now settled otherwise.

Chase v. Joyce, 4 Maul. & S. 412; Hammond v. Taylor, 3 Barn. & A. 408.

(G) Cannot dispose of his Bailiwick.

By the 23 H. 6, c. 10, it is provided, "That no sheriff shall let to farm in any manner his county, nor any of his bailiwicks, hundreds, or wapen-takes."

In the construction hereof it hath been holden, that this is a particular law, and must be pleaded, otherwise the judges cannot take notice of it.

3 Keb. 678, Ellis v. Nelson.

It hath been holden, that a lease thereof, though no rent was ever reserved, is within the statute, the intent thereof being that sheriffs should keep their counties in their own hands.

20 H. 7, 13; Dalt. Sh. 23.

It seems the better opinion, that a lease, reserving only part of the profits, is within the statute.

Plow. 87; Dalt. Sh. 23.

It hath been doubted, whether a lease made by the sheriff of his office or county only by parol be within the statute.

Dalt. Sh. 24.

It hath been adjudged in the case of the sheriff of Nottingham, who took money for his bailiwick, which he first gave his servants, and which they sold, but he himself received the money, that this was within the statute 4 H. 4; c. 5, which prohibits the letting to farm, &c., under certain penalties; and that it was not only *malum prohibitum*, but likewise *malum in se*, as tending to extortion and other oppressions.

Moor, 781, Stockwith v. North. Vide tit. *Office and Officers*, Vol. vii.

By the 3 Geo. 1, c. 15, § 10, "It shall not be lawful for any person to buy, sell, let, or take to farm the office of under-sheriff or deputy-sheriff, seal-keeper, county clerk, shire-clerk, jailer, bailiff, or any other office, pertaining to the office of high-sheriff, or to contract for any of the said offices, on forfeiture of 500*l.*, one moiety to his majesty, the other to such as shall sue in any court at Westminster within two years after the offence.

"Provided that nothing in this act shall hinder any high-sheriff from constituting an under-sheriff or deputy-sheriff, as by law he may, nor hinder the under-sheriff in case of the high-sheriff's death, when he acts as high sheriff, from constituting a deputy, nor hinder such sheriff or under-sheriff from receiving the lawful fees of his office, or from taking security for the due answering the same, nor hinder such under-sheriff, deputy-sheriff, seal-keeper, &c., from accounting to the high-sheriff for all such lawful fees as

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shall be by them taken, nor for giving security so to do, nor to hinder the high-sheriff from allowing a salary to his under-sheriff, &c., or other officers." (a)

(a) If a sheriff takes bond of his bailiff to pay 20*d.* for every defendant's name in every warrant in *mesne process*, it is not letting his *sheriffwick* to farm. Ballantine v. Irwin, M. 4, G. 2, C. B. Fort, 368.

(H) Of the High-Sheriff's Power and Duty in appointing an Under-Sheriff, and other Deputies: And herein,

1. Of the Under-Sheriff, and in what Manner appointed.

ALTHOUGH the king by his letters patent granteth to the sheriff *custodiam comitatus*, without any express words to make a deputy, yet hath the sheriff power to make a deputy or under-sheriff, who may execute all the ministerial parts of the office. For experience, says my Lord Hobart, proves that many sheriffs cannot execute it themselves. From the (b) antiquity thereof and necessity of this officer the law takes notice of him, and on his being appointed, the law implicitly gives him power to execute all the ordinary offices of the sheriff himself, that can be transferred by law.

Dalt. 3, 514; Hob. 13. (b) Was formerly called *seneschallus vicecomitis*, Dalt. Sh. 3. —And in statute Westm. 2, 13 Ed. 1, stat. c. 39, he is called *subvicecomes*; and in the statute 11 H. 7, c. 15, shire-clerk. 4 Co. Mitton's case; 9 Co. 49; Dyer, 355.

He is, says my Lord Hobart, in nature of a general bailiff to the sheriff over the whole shire, as others are over the hundred; and being in effect but the sheriff's deputy, according to the nature of a deputation, he is removable as an attorney is; and though made irrevocable, yet may the high-sheriff remove him. But having once appointed him, though he may totally remove him, yet he cannot (c) abridge him of any part of his power.

Hob. 13; (c) 2 Brown. 281.

The high-sheriff may execute the office himself, and the under-sheriff hath not, nor ought to have, any estate or interest in the office itself; neither may he do any thing in his (d) own name, but only in the name of the high-sheriff, who is answerable for him.

Dalt. Sh. 3. (d) An under-sheriff must act in the name of the high-sheriff, because the writs are directed to the high-sheriff. Salk. 96. || That under-sheriffs, &c., cannot act as solicitor, attorney, &c., see *ante*, (D).||

β If a person act generally as the deputy of the sheriff, with the consent and knowledge of the sheriff, the latter will be responsible for his official acts, although he may never have appointed him by express authority.

Bosley v. Farquar, 2 Blackf. 67*g*

By the 3 Geo. 1, c. 15, § 8, it is enacted, "That if any sheriff shall die before the expiration of his year, or before he be superseded, the under-sheriff shall nevertheless continue in his office, and execute the same in the name of the deceased till another sheriff be appointed and sworn; and the under-sheriff shall be answerable for the execution of the office during such interval, as the high-sheriff would have been; and the security given by the under-sheriff and his pledges shall stand a security to the king, and all persons whatsoever, for the due performing his office during such interval."

The under-sheriff, before he intermeddle with the office, is to be sworn; this is enjoined (e) by the statute 27 Eliz. cap. 12, and the form of the oath there prescribed.

(e) That before this statute the under-sheriff was never sworn. Roll. Rep. 274, *Per Coke*.

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And now by the 3 Geo. 1, c. 15, § 19, it is enacted, That all under-sheriffs of any counties in South Britain, except the counties in Wales and county palatine of Chester, before they enter upon their offices, shall take the following oath, viz. : " I, A B, do swear, that I will well and truly serve the king's majesty in the office of under-sheriff of the county of——, and promote his majesty's profit in all things that belong to the said office as far as I legally can or may, and will preserve the king's rights and all that belongeth to the crown. I will not assent to decrease, lessen, or conceal the king's rights, or the rights of his franchises; and whensoever I shall have knowledge that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchises, suits or services, or in any other matter or thing, I will do my utmost to make them be restored to the crown again; and if I may not do it of myself, I will certify and inform some of his majesty's judges thereof, and will not respite or delay to levy the king's debts for any gift, promise, reward, or favour, where I may raise the same without great grievance to the debtors. I will do right as well to poor as to rich, in all things belonging to my office. I will do no wrong to any man for any gift, reward, or promise, nor for favour or hatred. I will disturb no man's right, and will truly and faithfully acquit at the Exchequer all those of whom I shall receive any debts, duties, or sums of money belonging to the crown. I will take nothing whereby the king may lose, or whereby his right may be disturbed, injured, or delayed. I will truly return, and truly serve all the king's writs to the best of my skill and knowledge. I will truly set and return reasonable and due issues of them that be within my bailiwick, according to their estates and circumstances, and make due panels of persons able and sufficient, and not suspected or procured, as is appointed by the statutes of this realm. I have not bought, purchased, or taken to farm or contracted for, nor have I promised or given any consideration, nor will I buy, purchase, or take to farm, or contract for, promise, or give any consideration whatsoever by myself or any other person for me, or for my use, directly or indirectly, to any person or persons whatsoever, for the office of under-sheriff of the county of——, which I am now to enter upon and enjoy, nor for the profits of the same, nor for any bailiwick thereof, or any other place or office belonging thereunto. I have not sold or contracted for, or let to farm, nor have I granted or promised for reward or benefit by myself, or any other person for me, or for my use, directly or indirectly, any bailiwick thereof, or any other place or office belonging thereunto. I will truly and diligently execute the good laws and statutes of this realm, and in all things well and truly behave myself in the said office for his majesty's advantage and for the good of his subjects, and discharge my whole duty according to the best of my skill and power. So help me God."

Which oath is to be administered by such commissioners as shall be named to administer the oath to the high-sheriff, as often as a commission of *dedimus* shall be sued forth for that purpose, or by the barons, or one of them, when the sheriff desires to be sworn in town.

[The sheriff cannot depute two persons under-sheriffs extraordinary, to take an inquest.

Denny v. Trapnell, 2 Wills. 378.

Although service of a rule on the under-sheriff's *agent* in town is not good service, yet service at the *offices of the agents* for the under-sheriff of

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London, Middlesex, and Surry, is; because they are considered as the officers of the under-sheriffs.

Rex v. Coles, Dougl. 420.] || In an action against sheriff of Essex for not arresting a person on mesne process, notice of the party being in the bailiwick given to the agent in town, was held no notice to the sheriff. Gibbon v. Coggon, 2 Camp. 188.]

2. Of Covenants between the High-Sheriff, his Under-Sheriff, and other Officers.

It is meet and safe, says Dalton, for the high-sheriff to take good security from his under-sheriff and other officers before he trusts them with their offices; and for this commonly the high-sheriff taketh bonds and covenants from the under-sheriff and friends, as also of his bailiffs and jailer.

Dalt. Sh. 445; 2 Keb. 352. β A deputation necessarily expires with the office on which it depends. A deputy gave bond to the sheriff for the faithful performance of his duty "during the continuance of his appointment." The sheriff was afterwards re-appointed, and the deputy continued for several years. Held, that the word "during" should be restricted to the first year, for the deputation then expired. Banner v. M'Murray, 1 Dev. 218.g

And as this is allowed by law, it is holden, that if an under-sheriff covenants with the high-sheriff to discharge and save him harmless from all escapes of prisoners arrested by the under-sheriff, or any by him appointed, this is a good covenant; for since the high-sheriff transfers his authority, it is but reasonable he should take security for the faithful execution of it; and there is nothing intended against law, but rather to prevent than connive at escapes.

Hob. 12, 13; Moor, 856; Godb. 212; Brownl. 65.

But if the high-sheriff makes J S his under-sheriff, and takes a bond or covenant from him that he will not serve executions above 20*l*. without his special warrant, this is a void covenant, because it is against law and justice, inasmuch as when he is made under-sheriff, he is liable by the law to execute all process as well as the sheriff is.

Hob. 12, 13; Godb. 212; 2 Brownl. 281, Sir Daniel Norton v. Sims.

But it was resolved in the above case, that though this covenant was void in law, that yet the bond was good for the rest of the covenants which were agreeable to law; and a difference was taken between a bond made void by statute and by common law; for upon the statute of 23 H. 6, c. 9, if a sheriff will take a bond for a point against that law, and also for a due debt, the whole bond is void, for the letter of the statute is so; for a statute is a strict law; but the common law doth divide according to common reason, and having made that void that is against law, lets the rest stand.

Hob. 14; [2 Wils. 351.]

Also, it was resolved, that this case was not within the statute 23 H. 6, c. 9, because it was not a bond made by or on the behalf of a prisoner, and because the statute is not pleaded, as it ought to be, being a special law.(a)

Hob. 13. [(a) It is a public law. 2 Term R. 575.]

So, in debt upon an obligation entered into by the sheriff's clerk, or under-sheriff, for payment of money into the Exchequer within fourteen days after he received it, who pleaded the statute 23 H. 6, c. 9, and averred that it was taken *colore officii*; it was adjudged upon demurrer, that the statute extended only to bonds taken from those who were to appear, or who were in ward, and not to this case.

Moor, 242, Cartwright v. Dalesworth.

In debt on an obligation by the under-sheriff to the high-sheriff for saving
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him harmless, the defendant pleaded, that he had saved him harmless; which on demurrer was held an ill plea, because he might have saved him harmless in some things though not in all, and therefore *non damnificatus* had been the proper plea.

Stil. 19, Wroth v. Elsey. Vide tit. *Pleadings*, vol. vii.

In debt by an under-sheriff against his bailiff, on an obligation to save him harmless in the executing of processes and other things contained in the condition, it was objected, that it was not alleged that the process was to be executed within the hundred wherein he had jurisdiction; and this the court held a good objection, because the bailiff cannot execute a process out of the hundred wherein he is bailiff, by virtue of his general authority, but only as a special bailiff.

Stil. 18, Horton v. Day; Allen, 10, S. C. For though words of the condition were general to make return of all warrants directed to him, yet it was to be understood of such only as were to be executed within the hundred of which he was made bailiff. 2 Saund. 414, S. C. cited.

||And in an action by the sheriff against a bailiff's surety, for default in not executing a writ, it is necessary to aver that the warrant was *delivered* to the bailiff; and, as it seems, that it was *directed* to him.

Desanges v. Priestly, 3 Moo. 246.||

Debt on a bond to perform covenants, which was, that the defendant should not let at large any prisoner arrested without the sheriff's warrant: the plaintiff shows the defendant had let such a prisoner at large at Westminster, &c., it is good without showing the time and place of the arrest, for the escape is the material part of the covenant, and the manner of the arrest is not in question; and whether he were legally taken or imprisoned, was not material when he was suffered to go at large.

Sid. 30, Jenkins v. Hancock.

In debt on an obligation conditioned to perform the covenants and agreements in an indenture made between the sheriff of Essex and the under-sheriff, in which the under-sheriff covenanted to pay all sums of money which ought to be paid by the sheriff touching the execution of the said office, and to discharge the sheriff of them; the defendant pleads performance generally; plaintiff in his replication assigns a breach of non-payment of 40*l.* to the jailer of Chelmsford, expended *pro materia tangent' execut' offic' prædict*, viz., for the conducting of a prisoner from Chelmsford to York castle, and for his meat and drink in the journey, which sum the jailer hath recovered against the sheriff. Defendant rejoins, that the recovery was for a particular matter between them, and not for matter touching his office, and concludes to the country: upon which the plaintiff demurs. It was urged for the plaintiff, and agreed to by Wild, J., that the defendant ought not to have concluded his rejoinder to the country, but to have left it to the plaintiff to answer to. *Per cur.*—There is no good breach assigned; for the recovery within this covenant ought to be for such matter as concerns the sheriff, to which by law he is compellable. The recovery against the sheriff was in an *assumpsit*. It does not appear that the sheriff was obliged to bring him to York. It does not appear that the recovery was an *habeas corpus*; and the sheriff cannot deliver his prisoner to another sheriff without an *habeas corpus*, upon the back of which he writes his charges, which are allowed by the judges of assize; and this shall be allowed to him upon his account in the Exchequer, if the prisoner was

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carried into another county; but if it was in the same county, he shall not have allowance for his charges. As to that which is assigned, that part became due for finding meat and drink for the prisoner; this is no breach; for before the party is convicted he ought to live at his own charges, and therefore till conviction hath his goods, but after conviction at the charge of the king; and therefore the sheriff shall have allowance in the Exchequer. At the plaintiff's request the court permitted him to discontinue, paying the defendant all his costs without process.

H. 26 & 27 Car. 2, in B. R., *Lewin v. Alsop*; 3 Keb. 448, S. C.

{A contract between the sheriff and his deputy, that the latter shall pay the former a certain sum *per annum* in consideration of his appointment, is not illegal.

2 Day, 528, *De Forest v. Brainard*.}

3. *Of Acts that may be done by either of them, or where the High-Sheriff must himself be personally present.*

As it is impossible the high-sheriff can himself personally execute every branch and thing belonging to his office, and as the law, from the necessity of the thing, and in furtherance of justice, allows him to make a deputy, hence it is necessary that such deputy should in all things in which the high-sheriff's personal presence is not required, have the same power with the sheriff himself; and as by the nomination of him, the sheriff implicitly confers on him a power of doing all such offices as he himself could execute, and may be transferred by the law, it is likewise held, that the deputy's authority is by law so equal with the principal's, that any condition, covenant, or other bargain to restrain it is void; and therefore it is now universally agreed, that the under-sheriff may make bills of sale upon executions, assign bail-bonds, (a) make return to writs, and in general do every thing that the sheriff himself can do.

Hob. 12, 13; Salk. 95; Ld. Raym. 658; Com. Rep. 84, pl. 52. See 12 Mod. 467, 470, 690. (a) The under-sheriff himself may assign a bail-bond in the name of the high-sheriff, since stat. 4 & 5 Ann. c. 16, but the under-sheriff's clerk may not. *Kitson v. Fagg*, 1 Stra. 60. [But this case was denied to be law by Lord Mansfield, in the case of *Harris v. Ashley*, Sittings in Middlesex, Mich. Term 30 G. 2, where the assignment was under the seal of office, and was made by the under-sheriff's clerk, in his office, and that appeared to be the usual practice of making such assignment; and in *French v. Arnold*, Tr. 5 G. 3, this case of *Harris v. Ashley* being mentioned, Lord Mansfield said, he had mentioned it before he had determined it to Mr. J. Dennison, and afterwards to the other judges of the court, and they concurred with him in opinion that the bond was well assigned. 1 Stra. 60, Nolan's edition, notes.] || And it is now settled that an assignment of a bail-bond, or a return, made in the sheriff's name by a person generally employed in the sheriff's office, is valid. *Francis v. Neave*, 3 Bro. & B. 26; 6 Moo. 120, S. C., and 4 Camp. 36; and it is the same as to an assignment of a lease (taken in execution) by the person acting as under-sheriff. *Doe v. Brown*, 5 Barn. & A. 243. ||

Upon any writ or process delivered to the under-sheriff, he, as well as the high-sheriff, may direct his bailiff or other officer to arrest or otherwise to execute such process; but such bailiff or other officer must serve or execute it himself, for he cannot command any other to do it either by word or writing.

Dalt. Sh. 103.

So. the under-sheriff, bailiff, or other such officer, may, if need be, take the *posse comitatus*, that is, what number of other persons they shall think good, to execute any writ, process, or other lawful warrant to them

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directed; and such as shall not assist them therein, being required, shall make fine to the king.

Dalt. Sh. 104.

And as the under-sheriff is principally active in the execution of the office, so the courts have refused to grant an attachment against the high-sheriff where the under-sheriff refuses to return a writ, but will grant an attachment against such under-sheriff, and by a (*a*) rule oblige the high-sheriff to return such attachment against the under-sheriff. But the usual course is to direct the attachment to the coroners.

Cases in B. R. 454. (*a*) *Gravely v. Ford*, H. 5 Ann. in B. R. *β* An action on the case, for not paying money by him collected, does not lie against a deputy-sheriff, but the remedy of the party injured is against the sheriff only. *Hutchinson v. Parkhurst*, 1 Aik. 258.*g*

A writ upon the statute of Northampton was awarded to the sheriff and justices of peace of the county of Norfolk to remove a force; the under-sheriff by command of the high-sheriff executed the writ, and by virtue thereof arrested J S; and it was held, that the execution of the writ by the under-sheriff was good, especially as it named him only by the name of his office, and not by his proper name, and as it did not expressly command him to act in his proper person.

Cro. Eliz. 294, *Levett v. Farrar*.

But, in all cases where the writ commands the sheriff to go in person, there the writ is his commission from which he cannot deviate. But, if the sheriff return that he was there in person, and this return be received and filed, then any information to the contrary comes too late, because by the filing it is become a matter of record, against which no averment *in pais* lies, neither can the party have error upon the return.

Dalt. Sh. 34.

As, in a writ of partition, the sheriff must be on the lands in person according to the direction of the writ; and if he be not, the court upon information thereof, before filing the return, will order the filing to stay; and, if upon examination it be so found, will award a new writ.

Cro. Eliz. 9, 10, *Clay's case*.

So, in a writ of re-disseisin, in which, by the statute of Merton, the sheriff is judge as well as officer, he must execute it in person, and cannot make a deputy.

11 H. 4, 7; 6 Co. 12; Hob. 13; Jenk. 181.

So, in a writ of inquiry of waste, the sheriff must himself go in person and view the place wasted; for though in this case he is not in strictness judge, but is to inquire by the oaths of twelve men, &c., yet his writ being in nature of a commission, he must execute it in person; and, as he is *in loco judicis*, if the land lie in a franchise the sheriff cannot make his warrant to the bailiff of the franchise, or return *mandavi ballivo*, &c., for he cannot grant over the judicial power, but he must enter the liberty and execute the writ himself.

Reg. 23; 6 Co. 12; 8 Co. 52; 4 Co. 65; 2 Inst. 390; Dalt. 34; Dyer, 204, pl. 1.

So, in a writ of admeasurement of dower and pasture, the high-sheriff must execute these in person, being vicontiel and not returnable, and to which the parties may plead before the sheriff in the county, if they think fit, unless they are removed in C. B. by a *pone*, which the plaintiff may do without showing any cause.

F. N. B. 148; Dalt. Sh. 34; Noy, 21.

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So, in a writ *de nativo habendo*, if it goeth to the sheriff to hold plea of the matter, there, he is both judge and officer, and must execute it in person; but, where it is directed to the sheriff returnable in B, there his office is ministerial only, and he may execute it by his under-sheriff or deputy.

Bro. *Offic.* 36; Dalt. Sh. 34.

{A writ of inquiry of damages may be executed before a sworn deputy {1} of the sheriff: The inquisition is merely an inquest of office, and the act of presiding is ministerial and not judicial. There is no case in which a writ of inquiry may not be executed by a deputy, except where a statute of the writ itself requires the sheriff to attend in his proper person.

2 Johns. Rep. 63, Tillotson v. Cheetham. The deputy-sheriff may execute process in all cases where the high-sheriff is not specially required to go in person, or where the thing to be done is not of such a nature as to amount to a judicial act. Writs of *ad quod damnum* may consequently be executed by the deputy. 2 Wash. 126, Wroe v. Harris. {1} A general sworn deputy has, in New York, the same powers as an under-sheriff, while the sheriff is in office. 2 Johns. Rep. 73. See 1 Bin. 240, Hazard v. Israel.}

In a writ of *justices*, which is a commission to the sheriff to hold plea above 40s., the high-sheriff must execute it in person; and if it be done by the under-sheriff, the judgment thereon is utterly void, and *coram non iudice*.

2 Leon. 34.—Yet in this case my Lord Coke holds that the suitors are judges, and not the sheriff. 6 Co. 12, 13.

It hath been adjudged, that an assignment of prisoners by the under-sheriff is as valid as if made by the high-sheriff himself.

M. 6, G. 2, in C. B., Holt v. Greenlaw.

β The sheriff is responsible for money received by his deputy on erroneous process, it being received *colore officii*; and he cannot avail himself of the defect in the process.

The People v. Dunning, 1 Wend. 16.

But the sheriff is not amenable for the acts of his deputy, unless they have been performed in the ordinary line of his official duty as prescribed by law.

Gordon v. Gale, 7 Cowen, 739.g

4. The Manner of appointing Bailiffs and other (a) Officers; and therein of his being answerable for their Acts.

(a) By the 1 & 2 Ph. & M. c. 12, must appoint four persons in the county in his name to make replevins, &c. || It is usual to appoint more than four. Some act of appointment is necessary; for a replevin granted by a person acting as clerk and recognized by the sheriff, but without appointment, is invalid. Griffiths v. Stephens, 1 Chitt. R. 196. See 2 Brod. & B. 11; 8 B. Moo. 27; 1 Marsh, 27; 5 Taunt. 225, and *antè*, tit. *Replevin*.||

Although all writs and processes are directed to the high-sheriff, and usually delivered to the under-sheriff, yet, it being impossible for them to execute them all themselves, they are to make out warrants or precepts to their (b) bailiffs and other officers, who are to execute the same; and for that purpose they are empowered to appoint a bailiff in each hundred, and may appoint a special bailiff or particular person to execute a writ upon any certain occasion.

Dalt. Sh. 103, 117; Keilw. 86. β As to the power of sheriff's deputy, see Brooklyn v. Patchen, 8 Wend. 47; Tuttle v. Cook, 15 Wend. 274; Jackson v. Collins, 3 Cowen. 89; Hall v. Luther, 13 Wend. 491; Ferguson v. Lee, 9 Wend. 258; Walden v. Davison, 15 Wend. 575; Wilson v. Gale, 4 Wend. 623.g (b) A bailiff is to take the same oath appointed to be taken by the under-sheriff, by the statute 27 Eliz. c. 12, but a special bailiff, or one employed by the sheriff for a particular time only, as to execute one writ, &c., is not obliged to take the oath. Jon. 249; 2 Lev. 151.—The sheriff may take security from them, as he is answerable for their acts. Stil. 18.—For the form of such securities, vide Dalt. 118.—Cannot abridge them of their power. 2 Brownl. 283. || In Cumberland and Cornwall it seems there are no bound bailiffs 2 Black. R. 452; 8 Term R. 505; 1 Dow. & Ry. 309.||

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But, though the sheriff, having a writ directed to him, may authorize others to execute it, yet the person to whom he directs it must himself (a) personally execute it; but any one may lawfully assist him.

Dalt. Sh. 117. (a) And therefore an arrest by a bailiff's follower is not good. 6 Mod. 211. *β*A deputy-sheriff cannot deputize another to execute a writ. *Montgomery v. Scantland*, 2 Yerg. 337. *g*—And there made a *quære* whether good, though in the bailiff's presence. *β*No deputy can transfer his general powers, but he may constitute a servant or bailiff to do a particular act; an under-sheriff may therefore depute a person to serve a writ. *Hunt v. Berrell*, 5 Johns. 137. *g* [The arrest must be made by the authority of the bailiff; but he need not be the hand that arrests, nor in the presence, nor actually in sight, nor within any precise distance, of the person arrested. *Blatch v. Archer*, Cowp. 65.] If a warrant be directed to two men jointly to arrest another, yet either of them alone may do it. Co. Lit. 181.—If a warrant be directed to a bailiff and stranger *conjunctim et divisim*, it may be executed by the stranger only. Dalt. Sh. 104. ||But a warrant to four jointly, and not severally, will not authorize an arrest by one. *Boyd v. Durand*, 2 Taunt. 161. *Qu.* Whether every officer is not bound to produce his warrant on making the arrest, if it be demanded? *Hall v. Roche*, 8 Term R. 188; *sed vide* 9 Co. R. 69. ||

If a blank warrant be filled up with the name of a special bailiff, either by the party himself or bailiff, without the privity or subsequent agreement of the sheriff, this is such an abuse and contempt for which an attachment will be granted.

Noy, 101; *Moor*, 770 *β*A deputation by the sheriff must be filled up by him with the name of the person who executes the writ. *Montgomery v. Scantland*, 2 Yerg. 337. *g*

Also, the sheriff ought not to make a blank warrant for the attorney to fill up with a special bailiff.

Cases in B. R. 527, *per* Holt, C. J.

In trespass for a battery and imprisonment, the defendant justifies by writ out of the King's Bench directed to the sheriff, and a warrant thereupon made to him; the plaintiff demurs specially, because it is not pleaded that the writ was delivered to the sheriff in the common form; to which it was answered, that it was not necessary to be so pleaded; for if in truth a writ be sued out, and he make a warrant before the writ comes to his hands, it is well, and the precedents are both ways; and of this opinion was the whole court.

2 Lev. 19, *Jones v. Green*. *Vide* 1 Saund. 892.

But now by the statute 6 Geo. 1, c. 21, § 53, it is enacted, "That no high-sheriff, under-sheriff, their deputies or agents, shall make out any warrant before they have in their custody the writs upon which such warrants ought to issue, on forfeiture of 10*l*."

And by the 54th section of the said statute, "Every warrant to be made out upon any writ out of the King's Bench, Common Pleas, or Exchequer, before judgment, to arrest any person, shall have the same day and year set down thereon as shall be set down on the writ itself, under forfeiture of 10*l*., to be paid by the person who shall fill up or deliver out such warrant."

If a bailiff errant take J S in execution at the suit of J D, and after he escape by a rescue of himself, the sheriff, if he will, may have an action upon the case against the bailiff for his escape, because when he takes upon him to be his bailiff, there is an *assumpsit* in law to keep the prisoners safely, and not to suffer them to escape.

Roll. Abr. 98, *Attorton v. Harward*.

Under-sheriffs, bailiffs, &c., are looked upon as the high-sheriff's officers, for whom he shall answer as their (b) superior, and their acts are to many purposes considered as his own.

(b) For this *vide* 2 Inst. 382, 466; 9 Co. 98; 2 Jon. 60; 2 Lev. 158; Vent. 314; 2 Mod. 119; *Noy*, 69.

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§ Where the plaintiff's attorney requested the writ of *ca. sa.* to be executed by a particular bailiff, and himself accompanied the officer, and directed him to do an act which constituted the arrest illegal, the defendant having afterwards escaped; held, that it amounted to making the officer a special bailiff, and that the plaintiff could not sue the sheriff for the escape from illegal custody, and rendered so by the conduct of her own attorney.

Doe v. Tyre, 5 Bing. N. S. 573; 7 Scott, 704; 7 Dowl. 636.*g*

But, though the high-sheriff must answer for his under-sheriff and other officers, yet he is not to be punished criminally for their acts, nor to be imprisoned nor indicted for their misdemeanors.*(a)*

Latch. 187; Dalt. Sh. 3. [(a) This distinction that the sheriff is answerable *civiliter*, but not *criminaliter*, for the acts of his bailiffs, is perfectly correct, and adopted in several modern cases. And it is no objection to his being called upon to answer *civiliter*, that the acts done by his officers would also warrant a criminal prosecution against them. Nor is it necessary to found a proceeding against the sheriff, to show a recognition by him of his bailiff's act. *Ackworth v. Kempe*, Dougl. 40; *Saunderson v. Baker*, 3 Wils. 309; 2 Bl. R. 832, S. C.; *Woodgate v. Knatchbull*, 2 Term R. 148.] § The sheriff is liable, *civiliter*, for the acts of his deputy; the sheriff and his deputies are considered as one officer. *Watson v. Todd*, 5 Mass. 271; *Perley v. Foster*, 9 Mass. 112; *Vinton v. Bradford*, 13 Mass. 114; *Congdon v. Cooper*, 15 Mass. 10; *Campbell v. Phelps*, 17 Mass. 244; *Walden v. Davison*, 15 Wend. 575; *Etes v. Williams*, Cooke, 413; *Mantz v. Collins*, 4 Harr. & M'Henry, 65; *Tomlinson v. Wheeler*, 1 Aik. 194; *Johnson v. Eason*, 2 Aik. 299; *Green v. Lowell*, 3 Greenl. 373; *Morse v. Betton*, 2 N. H. Rep. 184; *Moore's Adm'r v. Downey*, 3 Hen. & Munf. 127; *James v. M'Cubbin*, 2 Call, 273; *Clute v. Goodell*, 2 M'Lean, 193; *Lawrence v. Sherman*, 2 M'Lean, 488.*g*

§ A sheriff who has resigned his office is liable for the acts of his deputy, done after his resignation, in completing the service of process placed in the deputy's hands before the resignation of the sheriff.

Larned v. Allen, 13 Mass. 295; *sed vide Blake v. Shaw*, 7 Mass. 505.

Where a *capias ad respondendum* is delivered to a deputy marshal who arrests the debtor, and the latter thereupon pays to the deputy the amount of the debt sued for; afterwards the officer discharges the defendant from custody, and returns the writ "debt and costs satisfied;" this is not an official act which binds the principal.

United States v. Moore's adm'rs, 2 Brock, 317.*g*

|| But the sheriff is in some cases liable to a penalty incurred by the act of the officer. Thus, he is liable in a *qui tam* action for a penalty on the statute 29 Eliz. c. 4, incurred by the officer's extortion.

Stanway v. Sheriff of Essex, 2 Bos. & P. 157; and *vide 4 Esp. 63*.

So, also, an action lies by a common informer against the sheriff, on the statute 44 Geo. 3, c. 13, § 4, to recover a penalty for the misconduct of the bailiff, in wilfully suffering a seaman arrested on civil process, and bailed, to go at large instead of delivering him over to the charge of a proper naval officer, according to that statute.

Sturmy qui tam v. Smith, 11 East, 25.*||*

And therefore for the personal torts and injuries of such officers they must answer themselves: (b) as, if the demandant in a writ of entry *surdisseisin* deliver a writ of summons to the under-sheriff of the county, and he summon the tenant upon the land accordingly, and notwithstanding do not return the writ, an action upon the case may be brought against the under-sheriff, if the plaintiff pleases; for, perhaps, the sheriff had no notice thereof, and it may be the under-sheriff took the fees for the execution of the writ.

Roll. Abr. 94; *Cro. Eliz. 175*; *Leon. 146*, S. C., *March v. Astry*. [(b) That is

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criminaliter; for all actions for breach of duty of the office of sheriff, by default of the under-sheriff or bailiffs, must be brought against the high-sheriff, so that the case in the text is not law. *Cameron v. Reynolds*, Cowp. 403.]

One who is arrested by a sheriff's bailiff is in the sheriff's custody, and if rescued, the sheriff may allege that he was rescued out of his custody.

2 Jon. 197; Lev. 214; 2 Lev. 26.

But, although in law the custody of the bailiff be the custody of the sheriff, yet the sheriff upon a rescue cannot return that such a one was in his custody, and rescued out of the custody of his bailiff, because of the repugnancy; but he may return that he was rescued out of his own custody, although he was never in his actual custody, or that he was rescued out of his bailiff's custody. (a)

2 Salk. 586, pl. 2; and vide Sid. 332; 2 Jon. 197. [(a) He cannot return, that the person was rescued out of the bailiff's custody: the return must be, that he was rescued out of *his* (the sheriff's) custody. *Per Buller, J.*, 2 Term R. 156.]

So, an arrest by the sheriff's officer is in judgment of law the same as if the arrest were by the sheriff in person, and if such officer suffer the party arrested to escape, the action must be brought against the sheriff.

5 Co. 89; Roll. Abr. 94.

But, if the sheriff direct his warrant to his bailiff, and afterwards J S put in his own name as special bailiff, and thereupon arrest the defendant, who escapes, here J S shall be only chargeable, and not the sheriff, because the defendant was never in the sheriff's custody.

Cro. Eliz. 745.

[If the sheriff appoint a special bailiff at the nomination of the plaintiff, the latter must take the consequences of the acts of the bailiff, and cannot rule the sheriff to return the writ.

De Moranda v. Dunkin, 4 Term R. 119; *Hamilton v. Dalziel*, 2 Black. 952, S. P.;]
|| and see *Pallister v. Pallister*, 1 Chit. R. 614.||

|| But if the defendant is in fact arrested, the sheriff is responsible for him, although he may have been arrested by special bailiffs, appointed at the plaintiff's request.

Taylor v. Richardson, 8 Term R. 505.

See further as to sheriff's bailiffs, and as to bailiffs of franchises and of manors, vol. i. tit. "BAILIFF."||

5. Of his Jurisdiction over Jails and Jailers.

Although all jails and prisons regularly belong to the (b) king, yet the sheriff shall have the custody of all persons taken by virtue of any precept or authority to him directed, notwithstanding any grant by the king of the custody of prisoners to another person.

And. 345; 4 Co. 34; 9 Co. 119; Cro. Eliz. 829. β The marshal is not liable for the escape of a prisoner under process of the courts of the United States. *Randolph v. Donaldson*, 9 Cranch, 76. g (b) Although a subject may have the custody or keeping of them. 2 Inst. 100.—But it is said that none can claim a prison as a franchise, unless they have also a jail delivery. Salk. 343; 7 Mod. pl. 1.—Cannot be erected by less authority than by act of parliament. 2 Inst. 705; but vide 11 & 12 W. 3, c. 19, by which justices of peace on presentment of the grand jury are empowered to raise money for that purpose; and tit. *Gaol and Gaoler*.

Every county hath two sorts of jails, one for prisoners by the sheriff taken for (c) debt, and this the sheriff may appoint in any house, or where

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he pleases; the other is for breach of the peace and matter of the crown, which is the (d) county jail.

Latch, 16; and vide And. 345. *β* When the sheriff is arrested, the coroner is bound to find some other place other than the county jail, within the county, for his imprisonment; and for this purpose he may make his house a prison. *Day v. Brett*, 6 Johns. 22.*g* (c) By the 22 & 23 C. 2, c. 20, § 13, it shall not be lawful for any sheriff or jailer to lodge prisoners for debt and felons together in one room, but they shall be kept apart, upon pain that they that offend against this act shall forfeit their office and treble damages to the party grieved. (d) By the 1 Ann. c. 6, those taken on an escape warrant are to be sent to the county jail.

β The sheriff is not liable to an action for imprisoning a debtor in the same room with criminals, if there be but one room in the jail.

Campbell v. Hampson, 1 Ohio R. 119; *Richardson v. Spencer*, 6 Ohio R. 13.

The sheriff is liable for an escape where there is no jail; but he has a remedy over against the county.

Brown County v. Butts, 2 Ohio R. 348; 6 Ohio R. 13.*g*

Though the sheriff may remove his jail from one (a) place to another within his bailiwick, yet he must keep it and his prisoners within it, and not suffer them to go at large out of the prison, though he himself attends them.

Hob. 202; Latch, 16; *Sid.* 318. (a) The Marshal of the King's Bench cannot keep his prisoners in other place than where the old prison is appointed, but the court of B. R. may by rule appoint it to be kept in any place in England, but then the marshal is to keep them, and the extent of the prison is to be limited by the rule. *Cro. Car.* 466. *Roll. Abr.* 810.—And that this was the proper method to be taken where the prisoners were in danger of the infection by the plague. *Hutt.* 29; and vide 19 Car. 2, c. 4, for empowering justices of peace to remove prisoners in case of infection.

β A sheriff may confine a defendant arrested under a *ca. sa.* in his own county, but, when the writ issued from another county, he cannot confine him in such county.

Rutherford v. Allen, 1 Car. L. Rep. 457.*g*

By the 2 G. 2, c. 22, § 1, "No sheriff, bailiff, or other officer shall convey any person by him arrested, by virtue of any process or warrant, to any tavern, alehouse, or other public victualling or drinking house, or to the house of such officer, or of any tenant or relation of his, without the free consent of the person so arrested, nor shall carry any such person to prison within twenty-four hours from the time of arrest."

See now 32 G. 2, c. 28.

But by the 3 Geo. 2, c. 27, § 6, "If any person shall be arrested by virtue of any process or warrant, and shall refuse to be carried to some safe dwelling-house of his own appointment, so as such dwelling-house be in a city or market-town, if such person shall be there arrested, or if out of a city or market-town, then within three miles from the place where the arrest shall be made, and so as such house be not the house of the person arrested, provided it be within the same county and liberty, it shall be lawful for the officer to carry the person so refusing to jail by virtue of such process."

This act has been suffered to expire.

The jailer is but the sheriff's servant, whom he may discharge at his pleasure; and if he refuses to surrender up or quit possession of the jail, the sheriff may turn him out by force, as he may any private person: also, they are each of them so far under the regulation of the Court of

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King's Bench, that they will compel the sheriffs to (a) assign prisoners, &c., the jailers to surrender up jails, &c.

Reg. 295. *β* The insufficiency of the jail is not a valid excuse in an action against the sheriff for an escape. *Smith v. Hart*, 2 Bay, 395; *Green v. Hein*, 2 Penn. 167. *g* [The modern acts of parliament for the regulation of jails seem to interfere a little with the sheriff's power over his jailer, and to introduce at least a concurrent power, acting as a check both upon the sheriff and his officer. *Vide* statute 24 G. 3, sess. c. 2, 54; 31 G. 3, c. 46; 34 G. 3, c. 84.] (a) Where the new sheriff was not bound to take delivery of a prisoner but in the common jail of the county. *Poph.* 85; 2 *Leon.* 54; *Hard.* 30, 33.

By the 14 E. 3, c. 10, "In the right of the jails, which were wont to be in the ward of the sheriffs, and annexed to their bailiwicks, it is assented and accorded that they shall be rejoined to the sheriffs, and the sheriffs shall have the custody of the same jails as before this time they were wont to have, and they shall put in such under-keepers for whom they will answer."

Confirmed by 19 H. 7, c. 10.

And therefore if a jailer, who is the sheriff's servant, suffers a prisoner to escape, the action must be brought against the sheriff, not against the jailer; for an escape out of the jailer's custody is by intendment of the law an escape out of the sheriff's custody.

2 *Lev.* 159; 2 *Jon.* 62; 2 *Mod.* 124; and *vide* 5 *Mod.* 414, 416, where it is said in general that jailers are liable for escapes; but the question being there touching the escape of a person committed for a criminal offence, must be understood of escapes in those cases for which whoever *de facto* occupies the office of a jailer is liable to answer; nor is it material whether his title to the office be legal or not. *Hal. P. C.* 114; 2 *Roll. Rep.* 146; 2 *Hawk. P. C.* c. 19, § 28, and *vide Hard.* 29, 35. That where actions for escapes are said to lie against jailers, such absolute jailers are intended as writs are directed to.—Yet it has been holden by my Lord Chief Justice Holt, that an action lies for a voluntary escape against the jailer, as well as against the sheriff, it being in nature of a rescue. 2 *Salk.* 441, pl. 2; 3 *Salk.* 18.

|| And where the sheriff's jailer discharged an insolvent debtor out of custody, under an order of justices in session, who had no jurisdiction to make such order, the sheriff was held liable to the plaintiff in an action of debt for an escape.

Brown v. Compton, 8 Term R. 424.

As the sheriff is liable for escapes of prisoners confined in the county jail for debt, he should require from the jailer a bond, with sufficient sureties, for the due performance of the duties of his office.

The defendant, as jailer, covenanted with the sheriff to attend the quarter sessions, and to remove prisoners under writs of *habeas corpus*, without permitting them to escape. The defendant being engaged at the sessions, the sheriff, upon a writ of *habeas corpus*, for the removal of a prisoner, directed his warrant to the defendant, and "W. W., by me (the sheriff) for this time only thereto specially appointed." W. W., who was the defendant's turnkey, proceeded with the prisoner towards the place of destination. The prisoner having escaped, it was held that the defendant was not liable upon his covenant, for W. W. was acting under the special authority of the sheriff, and not as deputy of the defendant.

Ryland v. Lavender, 2 *Bing.* 65.

Formerly the jailer, and from him the under-sheriff, received a fee, generally 2s. 6d. on a *liberate* granted to a debtor on his discharge; but now by 55 G. 3, c. 50, § 10, it is enacted, that such *liberate* shall be granted to such debtor free of all expenses; and by 13th section, any

(I) Of the preceding and succeeding Sheriff, &c.

jailer who shall, after the 1st of October, 1815, exact from any prisoner any fee or gratuity for or on account of the entrance, commitment, or discharge of such prisoner, or who shall detain any prisoner in custody for non-payment of any fee or gratuity, shall be rendered incapable of holding his office, be guilty of a misdemeanor, and be punished by fine and imprisonment.

β After a debtor has been lawfully committed to jail and he escapes, the sheriff is liable, however innocent he may be, unless the escape have been occasioned by the act of God or of public enemies.

Rainey's Ex'r v. Dunning, 2 Mar. 386.

If a mob riotously and by force demolish a jail, by which the debtors escape, the sheriff or jailer is answerable to the creditors for their escape.

Elliott v. Norfolk, 4 T. R. 789.g

See tit. "GAOL AND GAOLER," vol. iv.||

(I) Of the preceding and succeeding Sheriff; and herein of the Acts necessary to be done by each of them.

THE old sheriff may execute his office until his writ of discharge be delivered to him; and by the statute 12 E. 4, c. 1, "If any sheriff execute or return any writ or warrant within Michaelmas term after the 6th of November, and before any writ of discharge delivered to him, he shall not be damnified by the statute 23 H. 6, c. 8, although he hath occupied the office before the days of return *Crastino Martini*, *Octabus Martini*, or *Quinden Martini*."

Dalt. Sh. 18.

And by the 17 E. 4, c. 6, "Every old sheriff shall have power as well to execute and return every writ or warrant, as to execute every other thing which to the office pertaineth, during the terms of St. Michael and St. Hilary, unless he be lawfully discharged."

In an action of false imprisonment, the defendant pleaded that he was sheriff of W, and that by virtue of a *capias* directed to him he arrested the plaintiff, &c.; the plaintiff replied that J S was then sheriff; to which the defendant rejoined, that he had not notice of J S's patent, and that no writ of discharge was delivered to him; and on demurrer it was adjudged for the defendant, and that he continued sheriff till the writ of discharge delivered to him, or perfect (a) notice of the new patent.

Moor, 186, 364, St. John's case. (a) It seems the better opinion, that delivering the writ of discharge to the clerk of the county court, though in the absence of the sheriff, is sufficient notice, because every person being obliged to give his attendance there, shall be presumed to be present. Dyer, 355; Crompt. 203; Dalt. Sh. 18.

But, if the old sheriff, after he is discharged, shall make his warrant or precept to any of his late bailiffs or officers to arrest another, and the officer by force thereof shall arrest the party, an action of false imprisonment will lie against both the sheriff and officer.

Dalt. Sh. 18.

So, where the old sheriff returned the proclamation upon an exigent after that he was discharged of his office; it was adjudged, that the outlawry was void, and the party was discharged.

Dyer, 41; Dalt. Sh. 18.

All writs are by view and by indenture precisely to be set over by the old sheriff to the new, and if they have been executed by the old sheriff, they must be returned by him or in his name, and (b) endorsed by the new.

(I) Of the preceding and succeeding Sheriff, &c.

sheriff; but, if there hath been no execution by the old sheriff of them, then the return is to be in the new sheriff's name.

2 Roll. Abr. 457, 458; Bulst. 70; Dalt. Sh. 18; {4 East, 604, The King v. The late Sheriff of Middlesex.} (b) Thus, *Istud breve prout indorsaur mihi deliberatum fuit per R S, armiger. nuper vic. prox. predecessor. meum in exit. ab officio suo.* Dalt. Sh. 18; β Richards v. Porter, 7 Johns. 137.g

If the return of the old sheriff happen to be erroneous, and that a new sheriff be chosen, yet the court may cause the old sheriff, or his under-sheriff, clerk, or deputy, to amend the same.

Dalt. Sh. 19. β After the old sheriff is out of office he cannot return a writ executed by him. Richards v. Porter, 7 Johns. 137.g

|| And by a rule of B. R. T. 31 G. 3, where a sheriff, before going out of office, arrests a defendant, and a *cepi corpus* is returned, he shall, within the time allowed by law, be called upon to bring in the body by rule, notwithstanding he may be out of office before the rule granted.

4 Term R. 379.

The new sheriff is chargeable only with such prisoners as are handed over to him; and if the old sheriff arrest a defendant, and suffer him to escape, and go out of office before the return-day, he only is answerable for the escape.

Rex v. Sheriff of Middlesex, 4 East, R. 604.

In an action against the old sheriff for not arresting a defendant, where the sheriff went out of office before the return, it is not sufficient evidence to connect the sheriff with the officer, that the officer's name appear on the writ, and that the writ has been returned *non est inventus* by both sheriffs; since the return being made since the sheriff went out of office, is no recognition by him *as sheriff* of the officer being employed by him: it must be shown that the warrant was delivered to the officer, and the neglect committed by the officer while the sheriff was in office.

Fonsick v. Magnay, 1 Marsh, 554; 6 Taunt. 231. Vide 2 Stark. Ca. 202, 315; 7 Taunt. 1.||

The old sheriff is to deliver over by (a) indenture all the prisoners in his custody charged with their respective executions, and till such delivery by him they remain in the custody of the old sheriff, and he shall be answerable for them.

Cro. Eliz. 365, 366; Comyns, 155; Hob. 266; Bulst. 70; 2 Leon. 54; 3 Co. 72; 2 Roll. Abr. 457. (a) For the form whereof, vide Dalt. Sh. 18.

If the sheriff dies, and before another is made, one in execution goes at large, (b) this is no escape, for the prisoners were in the custody of the law till a new sheriff made; but after a new sheriff is made, he is bound to take notice of all executions against any persons he finds in the jail, for there is no person to make delivery or give him notice thereof.

3 Co. 72; Cro. Eliz. 366. (b) That there is no remedy but to take him again. 1 Mod. 14.

If J S be in execution at the suit of A and B severally, and the sheriff at the end of his year deliver him over to the new sheriff by indenture, in which indenture the execution at the suit of A only is mentioned, and the execution at the suit of B is omitted, this is an escape, for which an action lies against the old sheriff, though J S continues in prison; for *eo instante* that the old sheriff hath delivered his prisoners to the new, (c) he ceases to have the custody of them, and he cannot be in the custody of the new

(I) Of the preceding and succeeding Sheriff, &c.

sheriff at the suit of B with which he was never charged; and though the executions are of record, yet the new sheriff is not bound to take notice thereof.

3 Co. 71, Westley's case, adjudged upon a special verdict; Poph. 85, S. C.; Cro. Eliz. 365, S. C.; Moor, 688, S. C., adjudged upon a special verdict, being found also that the old sheriff gave no notice of this execution to the new, and affirmed upon a writ of error in the Exchequer Chamber. But it is said, that it seemed to the justices, that notice by parol would have been sufficient, though the execution was not mentioned in the indenture. (c) And the new sheriff is to be charged with an escape after. Cro. Ja. 380.—But, if a prisoner is omitted in the indentures, and so not turned over at all, he remains in the custody of the old sheriff. Sid. 335; Noy, 51; 2 Leon. 54; 2 Keb. 224. {See 1 Wash. 4, Johnson v. Macon.}

{If a new sheriff receives a prisoner from his predecessor, he is answerable for his escape, though a voluntary escape may have existed in the time of his predecessor; but the plaintiff has his election either to consider the prisoner in execution, and so charge the new sheriff for the last escape, or as out of execution, and charge the old sheriff. If he has once made his election, and sued the old sheriff, and recovered judgment against him, it is conclusive, and a bar to any action against the new sheriff.

4 Johns. Rep. 469, Rawson v. Turner.}

It hath been adjudged, that an assignment by the under-sheriff is sufficient; and also that an assignment of the prisoners, though not by indenture, shall bind the new sheriff, if he has notice of the causes where-with the prisoners are charged; for it seems the form of the indenture was introduced only for the conveniency and security of sheriffs; and therefore if a note or schedule only is made of the prisoners, with the causes of their imprisonment, and this delivered to the new sheriff, and thereupon he accepts the custody of the (a) jail, they are as effectually turned over as if done by indenture; *volenti non fit injuria*; and the new sheriff can no more pretend ignorance when the trust he engages in is declared to him by deed-poll than by indenture.

M. 6 G. 2, in C. B., Holt v. Greenlaw; 19 Vin. Abr. 454, pl. 8, Barnes's Notes, C. P. 259; 2 Kel. 125, pl. 101; Dalt. 15; Sid. 335, pl. 21; 2 Roll. Rep. 146; but the new sheriff may compel the old sheriff to make an assignment by indenture. 2 Kel. 125, pl. 101.—(a) That the new sheriff is not bound to take delivery of a prisoner but in the common jail of the county. Poph. 85; 2 Leon. 54; Hardr. 30, 33.—A writ for the new sheriff to compel an assignment by indenture from his predecessor. Reg. 295.*—* Sheriffs required to turn over all process not executed, by indenture to their successor. 20 G. 2, c. 37.—Writs to be turned over to the succeeding sheriff. Ibid.—[No sheriff shall be liable to be called upon to make a return of any writ or process, unless he be required so to do within six months after the expiration of his office. Ibid. § 2. A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within the above time, though he was requested by the party to return it before the expiration of the six months. Rex v. Jones, 2 Term R. 1.] || If the sheriff go out of office after having returned *cepi corpus* to a *latitat*, he may be ruled to bring in the body, and is liable to an attachment for failing to do so, notwithstanding he is out of office, provided he be ruled within a reasonable time. 4 Term R. 379; 1 H. Bl. 629; 7 Term R. 452; 1 Taunt. 111; 3 Barn. & A. 204.||

If upon a *fi. fa.* the sheriff seize goods, and he return that goods to such a value remain in his hands *pro defectu emptorum*, and he be removed, yet he, and not the new sheriff, is to proceed in the execution; for execution being an entire thing, he who begins must end it; and upon his neglect a *distringas nuper vicecomitem* lies, of which there are (b) two sorts, one to distrain the old sheriff to sell and bring in the money, the

(K) Where more than one Sheriff.

other to sell and deliver the money to the new sheriff to bring it into court, which plainly shows his authority continues by virtue of the first writ.

Dalt. Sh. 19; Salk. 323. (b) For which vide Thes. Brev. 90; 34 H. 6, 36; Rast. 164; {1 Dall. 313.} And that the *distringas* which commands the new sheriff to distrain the old one to sell and bring in the money, is the most usual. 6 Mod. 299. {And a *distringas* will lie against the sheriff while in office. 1 Dall. 312, Zane's Exrs. v. Cowperthwaite.} β See Anon., 1 Hayw. 415.g

|| And the statute 10 Geo. 3, c. 50, which empowers the court out of which a *distringas* issues to direct the issues to be sold and applied to pay the plaintiff's costs, is held to apply to writs of *distringas* against the late sheriff, and to all such writs.

Raiban v. Plaistow, Burr. 2727; Philips v. Morgan, 4 Barn. & A. 652.||

And therefore it hath been adjudged, that if the sheriff on a *fi. fa.* seize goods to the value of the debt, and pay part of the debt, and be discharged before he hath sold the rest of the goods or returned his writ, that notwithstanding such discharge, and without any writ of *venditioni exponas*, he may sell the goods remaining in his hands, and such sale and execution shall be good by force of the writ of *fi. fa.*

Cro. Ja. 73; Moor, 557; Roll. Abr. 893, 894, Aire v. Aden. But in Yelv. 44, S. C., it is said to be adjudged *cont.*, but seems to be a mistake; and vide Hob. 207; Cro. Eliz. 597; Yelv. 6; Dyer, 98; Godb. 276; Cro. Ja. 515; Latch, 117; 4 Leon. 20; 2 Saund. 47, 345; Mod. 31; || 1 Barn. & A. 230.||

If a *fi. fa.* (before statute) had been delivered to the sheriff 9th Nov., and he had executed it the same day, and after a writ of discharge dated 6th Nov. had been delivered to the sheriff the same day, if it did not appear the sheriff had notice of it before the execution served, the execution had been good.

Cro. Eliz. 440, Boucher v. Wiseman.

By the 3 Geo. 1, c. 15, § 9, "When any sheriff shall by process out of the exchequer extend any goods, &c., into the hands of his majesty, &c., for any debts due to the crown, and shall die or be superseded before a *venditioni exponas* be awarded for sale, or before he has made actual sale thereof, and a writ shall afterwards be awarded to a subsequent sheriff, who shall make sale of such goods, &c., the barons of the exchequer, if sitting, or if not sitting, they, or any one of them of the degree of the coif, shall settle the fees or poundage for such seizure and sale between such preceding and subsequent sheriff, with regard to the trouble each sheriff had in the execution of such process."

(K) Where more than one Sheriff.

IN London and Middlesex there are two sheriffs; the beginning of which custom seems to be founded on the charter of King John, who granted the sheriffwick of London and Middlesex to the mayor and citizens of London, at the farm of 300*l. per ann.*, so that being a grant in fee of the sheriffwick to them as a corporation, they had a right to name one or more officers in order to execute the same, and they thought it proper to name two officers indifferently to execute both offices, both of whom execute as one sheriff, though the writ in Middlesex is directed to them as one *vie' com' Middlesex præcipimus tibi*; in that of London it is to both *vie' comitib' London' præcipimus vobis*. The reason of this difference seems to be, that before this grant of the sheriffwick to the corporation, the corporation nominated to the crown, and the crown appointed the sheriffs for London, and the

(K) Where more than one Sheriff.

London sheriffs were responsible to the king for the London profits of the sheriffwick; and that was the reason why two were appointed, that both might be responsible, and this nomination was that the citizens might exhibit to the king responsible persons; and that seems to be the reason that, in many of the corporations that are cities and counties, there are two sheriffs. But when, by the charter of King John, the sheriffwick of London and Middlesex was granted to the citizens as a perpetual fee-farm, then they elected their sheriffs, who before were nominated for London only, and the election of the two was for both sheriffwicks; but the directions of the king's writs were as before, viz., in London to the two sheriffs, and in Middlesex as if there was only one.

Priv. Lond. 5, 272; 3 Co. 72 b; 2 Inst. 382; 2 Show. 262, pl. 268; Skin. 104, pl. 3; Carth. 482; Leon. 284; Gilb. Hist. P. C. 180.

Where there are two sheriffs, they regularly make but one officer, and therefore if one of them die, the office is at an end until another is chosen, and the courts of Westminster can award no process to the other.

4 Mod. 65.

If one sheriff of London make his return without his fellow, this being as no return at all is not aided by the statute, which aids insufficient returns, for the court takes notice that one sheriff there is two persons.

Hob. 70; Lit. Rep. 129.

But though they are considered but as one officer, yet, where in an information for a riot committed in Chester, it was suggested on the roll that one of the defendants was sheriff, whereupon the *venire* was prayed and directed to the other sheriff, and the defendants were found guilty: and it was moved in arrest of judgment that the *venire* should be awarded to the coroner, because both sheriffs make but one officer; in this case it was adjudged, that the *venire* was well awarded, and that where one sheriff is challenged, the other shall supply the place; and that the coroner is not the person to execute the process of the king's courts but where the proper officer is wanting, which cannot be where there is one sheriff.

4 Mod. 65; Salk. 152, pl. 2, The King v. Warrington; Carth. 214, S. C. And there said, that in the cases of Bethel, Sheriff of London, against Harvey, and of Rich, Sheriff of London, against Player, the *venires* were directed to the other sheriff alone; and vide Stil. 342.

In a writ of error to reverse an outlawry, among other errors, it was assigned, that the direction of the exigent to the sheriffs of the city of Lincoln was, *quod capias corpus ejus ita quod habeas corpus ejus, &c.*, where, they being two sheriffs, the writ ought to have been, *capiatis et habeatis: sed non allocatur*, for they both are but one officer to the court; and although in the end of the writ it is *ita quod habeatis ibi hoc breve*, yet there is no repugnancy, for it is good both ways.

Cro. Ja. 576, Gargrove v. Markham.

If there are two sheriffs of the same place, and an action of escape is brought against them both, if one of them dies, yet the writ shall not abate; for, it being in nature of a trespass, and merely personal, the party can only have remedy against the survivor.

Cro. Eliz. 625, Benian v. the Sheriffs of the city of York.

A prisoner in Wood-street Compter upon mesne process on a plaint levied against him, &c., escaped; whereupon the plaintiff brought his action against both sheriffs of London, and upon a demurrer to the declara-

(L) Of his Duty and Acts as a Judicial Officer.

tion of the plaintiff had judgment; and it was resolved, that though the plaint was levied before one defendant only in his court, and the prisoner escaped out of his compter, yet that both sheriffs had the custody of the prisoners in both compters, and by consequence the action was well maintainable against both.

Carth. 145; Show. 162, *Riding v. Edwin*.

|| Although the same persons are sheriffs of London and sheriff of Middlesex, yet on a writ directed to them as sheriffs of London, they have no authority to execute it in Middlesex; and so *e converso*.

Hammond v. Taylor, 3 Barn. & A. 408.||

(L) Of his Duty and Acts as a Judicial Officer.

THE sheriff hath in many things a judicial authority, and particularly in his torn, which is the king's court of record holden before the sheriff for the redressing of common grievances within the county.

|| Vide tit. *Courts, The Sheriff's Torn, The County Court*, antè, vol. ii. p. 768, 776, *et seq.*||

In this court the sheriff had anciently a very large and ample jurisdiction, for he could not only inquire of all capital offences, as treasons and felonies, but likewise issue process on them, and determine the same. But his power herein is now much restrained by statute; and 1st, by the statute of Magna Charta, c. 17, by which it is enacted, "That no sheriff, constable, or other bailiff of the king shall hold pleas of the crown." 2dly, By the statute of 1 E. 4, c. 2, his power of making out process upon these indictments is taken away, as well in case of indictments of felony as other misdemeanors within his cognisance; but he is to deliver all such presentments and indictments to the justices of the peace at their next sessions, who are to make out process thereupon, and hear and determine them; but, if the original presentment were not within the jurisdiction of the torn, the justices of peace ought not to proceed upon such indictments, though removed before them.

Cromp. Jur. 212; Stamf. 84; 2 Inst. 32; Dalt. Sh. 25; 2 Hal. Hist. P. C. 69; 2 Hawk. P. C. c. 10.

But, though the sheriff by the above-mentioned statutes is restrained from determining in capital offences, and issuing process in such cases, yet hath he still in his torn a judicial authority, *virtute officii*, of inquiring and taking presentments of all capital offences of a public nature, as all treasons and felonies at (a) common law, assaults and batteries, if accompanied with bloodshed; all affrays, being *in terrorem populi*; common grievances, as breaking of hedges, dikes, or walls; all common nuisances, as annoyances to common bridges or highways, bawdy-houses, &c., and all other such like offences, as selling corrupt victuals, breaking the assise of beer and ale, neglecting to hold a fair or market, keeping false weights or measures, &c.

2 Hawk. P. C. c. 10; 2 Hal. Hist. P. C. 69. (a) And therefore cannot take an inquisition of rape, because as the law now stands it is only felony by statute. 2 Hal. Hist. P. C. 69.

Also, a sheriff, as judge of a court of record, may in his torn impose a fine on all such as shall be guilty of a contempt in the face of the court, and on a suitor refusing to be sworn, and on a bailiff refusing to make a panel, and on a tithingman refusing to make a presentment, and on a juryman refusing to present the articles given in charge, and on a person duly chosen constable refusing to be sworn.

2 Hawk. P. C. c. 10, § 15.

(M) His Duty and Acts as a Ministerial Officer.

But he cannot take a presentment concerning the freehold, as he cannot hold a plea of lands; and therefore if a presentment charge a person with not repairing a highway as he ought to do by the tenure of his lands, this is to be removed into the King's Bench, and there traversed.

Dalt. Sh. 25; 3 Mod. 138.

The sheriff, as he is a principal conservator of the peace within his county, may *ex officio* award process of the peace, and take surety for it; and it seems the better opinion, that the security so taken by him is by the common law looked on as a recognisance or matter of record, and not as a common obligation or matter *in pais* only, for that it is taken by him by virtue of the king's commission, by which he is intrusted with the custody of the county, and consequently has by it an implied power of keeping the peace within such county.

Cro. Car. 26; 2 Hawk. P. C. c. 8, § 4.

In some cases the sheriff hath two powers, or a double or twofold authority; the one as judge, and the other as an officer, in the one and the same business; as in a writ of redisseisin, in a writ of inquiry of waste, in a *nativo habendo*, and in a writ of admeasurement of pasture, &c., in these cases the writ is as a commission to the sheriff, and by virtue thereof the sheriff is judge of the cause.

Dalt. Sh. 34. Vide what writs he is to execute in person.

(M) Of his Duty and Acts as a Ministerial Officer: And herein,

1. That he is the proper Officer to execute all Writs, except in case of Partiality.

THE sheriff is the immediate officer to the king's courts, to whom all writs and processes are regularly to be directed, and who is to execute the same without favour, dread, or corruption, to which he is sworn.

|| Of his duty as returning officer in elections, vide tit. *Court of Parliament*, (D) 3, vol. ii. || Dalt. Sh. 96; Plowd. 74; Dyer, 60.

And as this is an employment for the good and convenience of the public, if the sheriff refuse to receive a writ, or to execute it, this is an offence of a public nature, for which he may be fined (a) and imprisoned, and such an injury to the party grieved for which an action on the case lies.

Dalt. Sh. 101, 102. {If a defendant against whom a *ca. sa.* issues is visible, and carries on his business publicly as usual, and the sheriff neglects to arrest him, or returns *non est inventus*, an action on the case lies against him for the negligence or false return. 2 Esp. Rep. 475, Beckford v. Montague; 1 Day, 128, Frost v. Dougal. But the jury are not bound to give the plaintiff the whole amount of the debt, if the defendant in the former action continues solvent. 2 Esp. Rep. 475. See 1 Str. 650, Powel v. Hord; 1 John. Rep. 215, Potter v. Lansing. And the same action lies if the sheriff does not arrest, or levy on property, on the earliest opportunity, if the plaintiff is injured by his neglect. 1 Bos. & Pul. 27, 28, *per* Buller and Rooke, Js., in Benton v. Sutton, 1 Day. 128.} (a) An exigent delivered to the sheriff was embezzled, and a copy of it returned by him, for which he was amerced 30*l.* for the return of the copy, and 20*l.* for the embezzlement. 5 H. 4, 5; Dalt. Sh. 202.

And if any, says Dalton, fear the malice, indirect dealing, or negligence of the sheriff, &c., in the execution of any writ, they may deliver their writs in the open county court, or in any other place in the county; and may take of the sheriff or under-sheriff, being present, a bill, wherein the names of the demandants and tenants mentioned in the writ shall be contained, whereto, upon request made by him which delivered the writ, the

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sheriff or under-sheriff shall put to their seal for a testimony, without any fee; and if they refuse, others present may put their seals as witnesses.

Dalt. Sh. 202.

But, though the sheriff is the proper officer to whom process is to be directed, and who is to execute the same, yet, if he be partial, that is, such a one as from his consanguinity or affinity, his being under the power of either party, cannot be presumed indifferent in making a return of a jury, in such case the *venire* shall be directed to the coroners, if they are impartial, or to those of them who are so; and in case all the coroners are partial or not indifferent, as every officer who hath any way to do with the administration of justice ought to be, then the *venire* shall be directed to two elisors named by the court, against whom for that reason no challenge can be taken.

Lit. 158.

But, as the sheriff is the proper officer to return juries, if there be no legal exception against him, the court cannot slip him, and order another to return a jury, without the consent of the parties, to try an issue at the *nisi prius*. But, if there be any lawful objection to him, and it appear so on affidavit, then a special jury may be struck by the master of the office without the consent of the parties.

Mod. Cases, 248. ||Vide tit. *Jury*, vol. v.||

If one that is sheriff of a county levies a fine, the writ of covenant is to be directed to the coroners; for though the sheriff is the proper minister for the execution of all writs, yet, where the writ is brought against himself, and where he with others are parties to it, to prevent partiality, which every one is naturally guilty of, to himself, it has been the practice to direct the writ to the coroners.

Cro. Car. 415, 416; 1 Roll. Abr. 797.

In replevin it appeared that the *liberate* on a statute was executed by the conusee, being himself sheriff; and this was held erroneous.

Moor, 547.

If a sheriff of a county in a city be in contempt, the attachment is to go to the coroner, and not to the mayor or chief officer of the corporation in such city or town; and if the offender be out of his office, the attachment shall be directed to the new sheriff.

2 Vent. 216.

2. That he cannot dispute the Authority by which they issue, nor object any Irregularity in them.

Neither the sheriff nor his officers are to dispute the authority of the court out of which any writ, process, or warrant issues, but are at their peril truly to execute all such writs, &c., as are directed to them by the king's judges and justices, according to the command of the said writs, and hereunto they are sworn.

Dalt. Sh. 104. *β*A sheriff cannot refuse to execute a writ, or to detain a prisoner, on the ground of any irregularity in the process or proceedings of the court, provided it has jurisdiction of the matter. *Woodruff v. Barrett*, 3 Green, 40; *Ford v. Treasurer*, 1 Nott & M'Cord, 234; *Watson v. Watson*, 9 Conn. 140; *Went v. Morgan*, 3 Lo. Rep. 313.*g*

β A *fi. fa.* without a seal is void, and a sheriff is not bound to execute it.

Boals' Lessee v. King, 6 Ohio, 11; *State v. Curtis*, 1 Hayw. 471. See *Hall v. Jones*, 9 Pick. 446; *Smith v. Alston*, 1 Rep. Const. Ct., 104; *Filkins v. Brockway*,

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19 Johns. 170; but in Pennsylvania, if sealed the writ is good although not signed by the prothonotary. *Benjamin v. Armstrong*, 2 Serg. & R. 392. See *antè*, vol. i. p. 20.*g*

And hence it hath been held, that if a *capias*, exigent, or writ of execution issued against a peer, and was delivered to the sheriff, that he was obliged to execute it; and that if any such writ issued, and the party was taken thereupon and escaped, an action lay against the sheriff.

Dyer, 60; 9 Co. 68; 2 Bulst. 65. But now vide tit. *Privilege*. β To save himself from the consequences of an escape, it seems the sheriff cannot take advantage of an error in the original judgment. *Patton v. Freeman*, Coxe, 113.*g*

||Whenever a writ of mesne process is delivered to a sheriff wherein the defendant is sued by a wrong name, the sheriff should not execute it; for in such case, even if the defendant was known by that name, or had assumed it in the particular case, so as to afford a sufficient justification to the sheriff in acting under it, yet he would not be liable to an action for not executing it.*(a)* Whereas, on the other hand, unless the defendant was as commonly known by the name by which he was sued as his real name, the sheriff would be liable to an action of trespass for taking the defendant or his goods under it.*(b)* But the sheriff is bound to execute a *ca. sa.* in which the defendant is misnamed, for the defendant should have pleaded in abatement; and, by not doing so, he has admitted the name, by which he was arrested, to be his real name.*(c)*

(a) *Morgan v. Bridges*, 1 Barn. & A. 647; and see 2 Bulst. 256. *(b)* *Cole v. Hindson*, 6 Term R. 234; *Shadgett v. Clipson*, 8 East, 328; *Price v. Harwood*, 3 Camp. 108; *Scandover v. Warne*, 2 Camp. 270. *(c)* *Crawford v. Satchwell*, Stra. 1218.||

β The sheriff is a ministerial officer, and is justified in serving a foreign attachment, though the defendant may have been in the state when the writ was issued.

Swantz v. Hunt, 2 Nott & M'Cord, 211.*g*

But herein there is an established distinction mentioned in a variety of books and cases, to wit, that when a court hath jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, there the officer, or minister of the court who executes the precepts, is excusable; for the rule is, *quicumque jussu judicis aliquid fecerit non videtur dolo malo fecisse, quid parere necesse est*. But, when the judge hath no jurisdiction of the cause, there the officer is not obliged to obey, and if he does, it is at his peril, though he do it by virtue of a precept directed to him; a void authority being the same as none at all.

22 E. 4, 33; 10 Co. 76; Dalt. Sh. 106; 2 Leon. 84; Dyer, 175; 8 Co. 141; 5 Co. 64; 2 Bulst. 64; Cro. Ja. 280; Poph. 203; 2 Saund. 100; 3 Mod. 325; Carth. 148; 3 Wils. 345. β A sheriff is bound to inquire into the authority of a court that issues a writ, and he is liable for executing a writ issued by a court having no jurisdiction. *Mayor v. Morgan*, 7 Mart. Rep. N. S. 2.*g*

Therefore, if a *formedon* issues out of the Court of King's Bench, or an appeal out of the Common Pleas, though these are *(d)* superior courts, yet not having jurisdiction in these matters, the sheriff is not obliged to execute the writ.

2 Bulst. 64; Dalt. Sh. 105. *(d)* Where in escape the plaintiff declared that the sheriff arrested J S by virtue of a *latitat*, without saying out of what court it issued; and it was urged, that though the sheriff could not take advantage of an erroneous process, that yet he might of a void writ. 5 Mod. 413; Ld. Raym. 397.

If justices of peace arraign a person of treason in their sessions, who is convicted and executed, this is felony as well in the justices as sheriff or officer who executed their sentence; but, if he had been indicted of a tres-

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pass, found guilty and hanged, though this had been felony in the justices, yet it would not be so in the sheriff, because a matter in which the justices had jurisdiction, and in which they only were to blame in exceeding their authority.

Dalt. Sh. 107.

In an action upon the case in *Banco Regis* against an officer of the inferior court for an escape, if the plaintiff declares that he brought an action against J S in the said inferior court (as in Kingston upon Hull) upon an obligation made (a) at Halifax in *comitatu Eborum*, and does not allege this to be within the jurisdiction of the said inferior court, and that upon this judgment was given, and execution granted, and the defendant took him in execution and suffered him to escape, and thereupon he hath brought this action; this declaration is not sufficient to charge the defendant, because it is not alleged that the obligation was made within the jurisdiction of the court; for though the action be transitory, yet this inferior court having but a limited jurisdiction of things arising within the jurisdiction, (b) the proceedings there were *coram non judice*, and wholly void, of which the officer shall take advantage in this action upon the escape.

Roll. Abr. 809, Richardson v. Bernard; and vide Noy, 45; 2 Show. 424, pl. 391; 2 Lutw. 1569. (a) Salk. 202. Said it would have been otherwise if it had not appeared where made. And Lutw. 1567, it is said the cause of action, by the declaration appearing to be out of the jurisdiction, was the cause of this action not lying. Skin. 51; 2 Mod. 197; 3 Lev. 23, like point. (b) 4 Inst. 231; 3 Lev. 23, 234.

So, if A declares that he prosecuted one J S in the court of Ely, upon a bond made *infra jurisdictionem*, upon which he was in execution, and that the defendant suffered him to escape, if the jury find that there was such a prosecution, but that the bond was not made *infra jurisdictionem*, the action does not lie; for all that was done was *coram non judice*; and therefore no legal commitment; and though the defendant in the court below pleaded *non est factum*, yet that could not give the court any jurisdiction which it had not originally in the cause.

2 Mod. 29, 30; Squibbs v. Hole, adjudged by three judges against Ellis.

If after the year a *capias ad satisfaciendum* is taken out, and the defendant thereupon arrested, and after suffered to escape, debt lies for this escape, (c) though the process was erroneously awarded; for it was sufficient to arrest him, and the sheriff may justify in an action of false imprisonment, and (d) therefore cannot let him at large.

Cro. Eliz. 188, Bushe's case; 7 Mod. 29; Salk. 273, pl. 4, S. P. adjudged; Ld. Raym. 775. (c) That the sheriff can take no advantage of error in the process. Cro. Eliz. 767, 893; 2 Bulst. 258; 8 Co. 142; Godb. 27; Noy, 78; Cro. Ja. 230, 289; Stil. 232; 3 Mod. 325; Carth. 148.—But otherwise, if the arrest was void; as if the arrest, on which the escape is supposed, is laid to be out of the county of which the defendant is sheriff. Cro. Eliz. 877; and vide Noy, 51; Brownl. 79; Owen, 72; 5 Mod. 413.—If the judgment is reversed for error, the sheriff may plead *nul tiel record*. 8 Co. 142; Saund. 39; Lev. 95. (d) Though the sheriff may justify the execution of a *capias* tested out of a term, yet the plaintiff shall not take advantage thereof so as to charge the sheriff for an escape. 7 Mod. 30; 2 Salk. 700, pl. 4, per Holt, C. J.

¶ And where the sheriff took the bail on a *ca. sa.* erroneously issued against them on a judgment in *sci. facias*, on their recognisance in C. P., (in which court the recognisance acknowledges a sum to be levied only of the *goods and lands* of the bail,) and an action of escape was brought against the sheriff for releasing the bail on payment of the money into his hands, the Court of C. P. set aside the *ca. sa.* on application by the sheriff

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as being irregularly issued. The action for the escape was thereby stopped, and the plaintiff was at liberty to proceed, on account for money had and received, to recover the sum paid by the bail, which the sheriff retained on the ground of the bankruptcy of the bail to whom it belonged. *Qu.* Whether the sheriff would have been liable to an action for false imprisonment at suit of the bail?

Wooden v. Moxon, 2 Marsh, 186 ; 6 Taunt. 490.||

If one taken upon a writ *excommunicato capiendo*, upon a sentence in the spiritual court for non-payment of money decreed for tithes and costs, escapes, and action will lie against the sheriff; for though this is founded on a matter merely spiritual, yet the process issues out of a temporal court, and is directed to and executed by a temporal officer, and the damages consequential thereupon are temporal.

Lutw. 121, Slipper v. Mason, adjudged.

If a commission of bankruptcy issues against A, who refuses to be examined, and thereupon he is committed to prison, and the jailer suffers him to escape, as the commissioners had sufficient authority to commit, an action lies by the creditor for the escape.

Roll. Rep. 47 ; 2 Bulst. 236 ; Moor, 834, Barnes v. Gary.

If one be taken on a *capias ad satisfaciendum*, between the teste and return whereof a whole term intervenes, and the sheriff suffer him to escape, an action lies against him ; for this writ was not void, the party not being prejudiced thereby, for he had no day in court, and must however lie in prison ; otherwise, where taken upon a *capias ad respondendum*, in which a term intervenes between the teste and return, for such writ is void, and by the intermission the cause is discontinued and out of court, and so the sheriff not chargeable.

Salk. 700, pl. 4 ; Ld. Raym. 775, Shirley v. Wright. [See the same distinction, and this case cited with approbation by De Grey, C. J., in 3 Wils. 344, 345.]

(N) How he is to execute such Writs: And herein,

1. That it must be without Favour or Oppression, and after such Writ is actually taken out, and before it is returnable.

THE sheriff being obliged to execute every writ and process issuing, and directed to him by lawful authority, he is likewise obliged by the duty of his office to execute such process with the utmost expedition, or as soon after he receives it as the nature of the thing will admit of. And herein there cannot be a surer rule for him to go by than a strict observance of what is enjoined by the writ. But, as on the one hand he must not show any favour, nor be guilty of any unreasonable delay ; so, on the other hand, he must not be guilty of oppression, nor make use of other force nor greater violence than the thing requires.

Dalt. Sh. 109 ; *β*Hinman v. Borden, 10 Wend. 267 ; Jackson ex dem. Lansing v. Law, 5 Cowen, 248 ; McDonald v. Neilson, 2 Cowen, 139 ; Haggerty v. Wilber, 16 Johns. 287 ; Brewster v. Van Ness, 18 Johns. 133 ; Kennedy v. Brant, 6 Cranch, 187.g

β The sheriff is bound when an execution is regular on the face of it, to levy upon goods, if he can find them, and he cannot excuse himself for the omission, because the sum specified in it varies in amount from that for which the judgment was rendered.

Parmalee v. Hitchcock, 12 Wend. 96.

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The sheriff is bound to use all reasonable endeavours to execute process, and should at least go to the residence of the party.

Hinman v. Borden, 10 Wend. 267.

He is bound to serve process notwithstanding a claim of privilege.

Willard v. Sperry, 1 Wend. 32.

He is always bound to receive the amount of money for which a *fi. fa.* has been issued, and forbear to sell.

Jackson ex dem. Lansing v. Law, 5 Cowen, 248.

The sheriff is required to obey the *fi. fa.* by having the money at the return-day; he should show no favour, give no unreasonable delay, be guilty of no oppression, nor use any more severity than the case requires.

McDonald v. Neilson, 2 Cowen, 139.

The marshal of the District of Columbia is bound to serve a subpoena in Chancery as soon as he reasonably can, and is not excused by the fact that his deputy, by mistake, filed the process with other papers as served, and gave it so filed to another deputy by whom the mistake was discovered.

Kennedy v. Brent, 6 Cranch, 187.*g*

If the defendant doth the thing commanded by the *præcipe*, yet the sheriff is to serve the process, and to make return thereof.

Dalt. Sh. 110.

A *sworn and known officer*, be he sheriff, under-sheriff, bailiff, or serjeant, *need not show his warrant or writ* when he cometh to serve it upon any man's person or goods, although the party demandeth it; but a *special bailiff must show his warrant* if the party demands it, otherwise he need not obey it. Also, such known officer upon the arrest ought to declare the contents of his warrant, at whose suit he makes the arrest, out of what court, when returnable, to the end that, if it be upon an execution, he may pay the money, and so free his person; or, if on mesne process, that he may put in bail, or agree with his adversary.

9 Co. 69; Dalt. Sh. 110; Cro. Ja. 485. {See 8 Term, 188.}

If any officer do arrest a man before that he (*a*) hath a warrant, and afterwards do procure a warrant, or a warrant come to him to arrest the party for the same cause, yet the first arrest was wrongful, and the party grieved may have his action of false imprisonment.

Dalt. Sh. 111. (*a*) If in truth a writ was sued out, and the sheriff had made his warrant before the writ came to his hands, this hath been held well. 2 Lev. 19; 1 Saund. 208.—But now by the 6 G. 1, c. 21, it is enacted that no high-sheriff, &c., shall make out any warrant before they have in their custody the writs upon which such warrants ought to issue, on forfeiture of 10*l*.

And as the sheriff cannot arrest before the writ issues, or make his warrant before it comes to his hands, it hath also been adjudged, that he cannot execute it after the return, not even the very next day after, and before the *quarto die post*.

Sid. 229, Ellis v. Jackson. {2 Esp. Rep. 585, Parrot v. Mumford; 4 Johns. Rep. 450, Vail v. Lewis; 2 Cain. 243, Devoe v. Elliot.}

|| If a bailiff make an arrest, or execute a warrant before the writ is issued, he is a trespasser, and a warrant subsequently directed and delivered to him will not legalize his acts.

Hall v. Roche, 8 Term R. 187.

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So, if the warrant be directed to one person, and he insert the name of another bailiff, or if the place for the name be left blank, and the name inserted after it is issued, the person whose name is so substituted is a trespasser for taking the defendant or his goods under such a warrant.

Housin v. Barrow, 6 Term R. 122; Burslem v. Fern, 2 Wils. 47.]]

β *A. fi. fa.* must be executed by the sheriff making an actual levy on the goods, and making an inventory of them. For this purpose, the sheriff must have the goods in his power.

Haggerty v. Wilber, 16 Johns. 287.g

2. Of his raising the Posse Comitatus.

By the common law, the sheriff may raise the *posse comitatûs* or power of the county, that is, such a number of men as are necessary for his assistance, in the execution of the king's writs, quelling of riots, apprehending traitors, robbers, &c.; and herein every person above the age of fifteen, not aged or decrepit, is bound to be aiding, and (a) if they refuse to assist *may be punished by fine and imprisonment*.

Flet. 1. 2, c. 62; Bract. 1, 5; Lamb. 157; 2 Inst. 193, 453; β Coyles v. Hurtin, 10 Johns. 85.g (a) The statute 2 H. 5, c. 8, inflicteth both fine and imprisonment upon such as shall not aid the sheriff, they being thereunto required. Dalt. Sh. 356.

This power is not only allowed the sheriff, but likewise is given to his bailiff or other minister of justice, having the execution of the king's writs, who being resisted in endeavouring to execute the same, may lawfully raise such a force as may effectually enable them to overpower any such resistance. Also, a constable, or even a private person, may assemble a competent number of people, in order, with force, to suppress rebels or enemies, or rioters, and afterwards with such force actually to suppress them. So, a justice of peace, who has just cause to fear a violent resistance, may raise the *posse* in order to remove a force in making an entry into or detaining lands.

Dalt. Sh. 354; And. 67; Poph. 121; Moor, 656; 2 Inst. 193.

But, notwithstanding what was allowed and enjoined herein by the common law, it was thought necessary by (b) positive laws to remedy the great inconvenience which there was in ancient times by the resistance given to the king's writs, and therefore the statute (c) Westm. 2, (13 Ed. 1, stat. 1,) c. 39, enacts as follows: *Multoties etiam falsum dant responsum mandando, quod non poterunt exequi praeceptum regis propter resistentiam potestatis alicujus magnatis. De quo caveat vic' de cætero, quia hujusmodi responsa multum redundant in dedecus domini regis et coronæ suæ, et quam cito sub-ballivi sui testificentur, quod invenerunt humo'i resistentiam statim omnibus omissis assumpt' secum posse comitat' sui eat in propriâ personâ suâ ad faciend' execution', et si inveniât, &c.*

(b) By Westm. 1, 3 E. 1, c. 17, if a distress be impounded in a castle or fortress, and detained, the sheriff or bailiff, taking with him the power of the shire, &c., may cause the said castle or fortress to be beaten down. Dalt. Sh. 354. (c) The original commitment for contempt seems to be derived from this statute; for since the sheriff was to commit those who resisted the process, the judges that awarded such process must have the same authority to vindicate it: hence, if any one offers any contempt to this process, either by word or deed, he is subject to commitment during pleasure, viz., *a qua non deliberetur fine speciali præcepto domini regis*; so that notwithstanding the statute of Magna Charta, that none are to be imprisoned *sine judicio parium, vel per legem terræ*, this is one part of the law of the land to commit for contempts, and confirmed by this statute.

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The words of this statute have been construed to extend to executions only, and not to writs on mesne process; and that the sheriff was not obliged to raise the *posse comitatûs* where the party wasailable, for that it cannot be presumed that in such cases the king's writ will be disobeyed.

Roll. Abr. 807, May v. Proby; Roll. Rep. 388, 440, and Cro. Ja. 419, S. C. adjudged, and agreed *per cur.* that though the sheriff was not obliged, that yet he may take his *posse* to serve mesne process. Cro. Eliz. 868; Noy, 40; Moor, 852; 3 Bulst. 198; 2 Lev. 144; 3 Lev. 46, S. P.

Upon a writ of seisin, the sheriff returned that he could not deliver seisin for resistance, and for that the sheriff did not take the power of the county according to the statute, he was amerced twenty marks.

Fitz. Execut. 147; Dalt. Sh. 354.

So, in replevin, if the sheriff return that the cattle are in a fort or castle, so as he cannot make deliverance, he shall be amerced.

Dalt. Sh. 355.

β To enable him to execute *mesne* process, the sheriff may, but he is not obliged, to raise the *posse comitatûs*.

Crumpler's Ex'rs v. Glisson, N. C. Term Rep. 79.g

A man demands the peace in Chancery against a great lord, and hath *supplicavit* directed to the sheriff, &c., there, if need be, the sheriff may take the *posse* to aid him to arrest such lord.

Dalt. Sh. 355.

The sheriff, if need be, may raise the power of the county to assist him in the execution of a precept of restitution; and therefore if he make a return thereto, that he could not make a restitution by reason of resistance, he shall be amerced.

Dalt. Sh. 355; Lamb. 157.

But, though it be the duty of the sheriff or other minister of justice, having the execution of the king's writs, and being resisted in endeavouring to execute the same, to raise such a power as may effectually enable them to overpower any such resistance; yet, it is said not to be lawful for them to raise a force for the execution of a civil process unless they find a resistance, and it is certain that they are highly punishable for using any needless outrage or violence therein.

3 Inst. 161; 2 Inst. 193; Hob. 62, 264. Vide tit. *Attachment*.

3. *Of his breaking open Doors.*

Regularly the sheriff cannot, in executing a writ, break open the door of a dwelling-house. This privilege, which the law allows to a man's habitation, arises from the great regard the law has to every man's safety and quiet, and therefore protects them from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect; and hence it is that every man's house is called his castle.

5 Co. 91, Semain's case; 3 Inst. 162; Dalt. Sh. 350; β Allen v. Martin, 10 Wend. 300.g

And therefore upon a *capias*, *fieri facias*, or other process at the suit of a common person, the sheriff, after request to open the doors, and denial, cannot (a) break the (b) house of the defendant, and in such case the sheriff would be a trespasser, though the execution would be (c) good.

5 Co. 92 b; Cro. Eliz. 909; Moor, 668; Yelv. 28, March 4; Cro. Car. 537; Jon. 430; Bulst. 46. (a) Cannot open a latch. Dalt. 350.—Where the door was a little

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opened to see who was there, and the bailiffs rushed in with drawn swords. Hob. 62; and vide Hob. 263, 264; State v. Armfield, 2 Hawks, 246.*g* (b) * If the officer findeth the outer door open, and entereth the house that way, or if the door be open to him from within, and he enter, he may break open *inward* doors if he findeth that necessary in order to arrest the defendant on mesne process in a civil suit. Post. Cr. Law, 319; * {1 Bay, 358, The State v. Thackam.} So determined in Lee v. Gansell. Loft's Rep. 374; Cowp. 1; where the defendant was a lodger, and had separate apartments; but the street-door was open. {5 Johns. Rep. 352, Williams v. Spencer, S. P. And it seems that the officer may justify breaking open inner doors of the defendant's house, though the defendant be not therein at the time. But in such case the officer must first demand admittance. 3 Bos. & Pul. 223, Ratcliffe v. Burton.} (c) But it seems to be the modern practice in some cases, on complaint by affidavit, to discharge such execution, and to grant an attachment against the officer.†——† In Trinity term 17 Geo. 3, the Court of Exchequer set aside an execution issued under such circumstances, in the case of Yeates v. Delamayne, Esq.

β What is an outer door came in question in the following case: In trespass for breaking into the plaintiff's house, which was an unfinished house, the defendants justified under a writ of *ca. sa.* against the plaintiff, and averred, that they peaceably entered the house through a hole in the wall. It appeared that this hole in the outer wall of the house opened into a small room or closet, which had a room over it, and that having entered this place, the defendants tore down some boards, by which a staircase window which opened into this place was boarded up. It was proved by the builder that this hole in the outer wall was not intended to have either a door or window put in it, but was to remain open, so that the place in question should be used as a conservatory. Held, that if this hole in the wall had been intended to have had a door or window put into it, it must be considered that the outer fence of the house had been left open, and that the defendants were justified in entering; but that if this hole was always intended to be left open, the staircase window must be considered as the outer fence of the house, and that the defendants were therefore not justified in forcing it.

Whalley v. Williamson, 7 Carr. & Paine, 294. See Karby v. Derby, 1 Mees. & Wels. 336.*g*

But, notwithstanding this general rule, yet in all cases where the king is party, if the door be not open, the sheriff may break the door of the party, either to take him, or to execute the process, if he cannot otherwise enter therein; but, before he enters, he ought to signify the cause of his coming, and make request to have the door opened.

5 Co. 91; || Cro. Eliz. 909.||

||And an outer door may be broken, after demand made of admission, in execution of the speaker's warrant for commitment of a member of parliament to the Tower for a breach of privilege, this being process of contempt.

Burdett v. Abbot, 14 East, 1; 4 Taunt. 401.

In execution of criminal process against a party guilty of a misdemeanor, a demand must be made before an outer door can be broken. *Qu.* Whether it is necessary in case of felony?

Lannock v. Brown, 2 Barn. & A. 592.||

Upon a *capias* grounded upon an indictment for any crime whatsoever, or upon a *capias* from the King's Bench or Chancery, to compel a man to find sureties for the peace or good behaviour, or even upon a warrant

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from a justice of peace, for such purpose the officer may break open the door of a dwelling-house.

27 Ass. 35; 12 Ca. 131; Moor, 606; Crom. 170.

So, upon a *capias* (a) *utlagatum* or *capias pro fine* in any action whatsoever.

Gouls. 179; 4 Leon. 41; Dalt. Sh. c. 94; Moor, 609; Cro. Eliz. 908; Yelv. 28. (a) Though on mesne process, and at the suit of the subject. 2 Show. 87, pl. 78.

So, upon the warrant of a justice of peace for the levying of a forfeiture in execution of a judgment or conviction for it, grounded on any statute which gives the whole, or but part of such forfeiture, to the king, and authorizes the justice of peace to give such judgment or conviction for it.

2 Jon. 233.

So, where a forcible entry or detainer is either found by inquisition before justices of peace, or appears upon their view.

Dalt. Sh. 353.

So, upon a (b) commission of rebellion out of chancery, the sheriff or his officers, or the commissioners, may break open the doors or house to apprehend the party, whether it be his own house or that of a stranger, if upon request such house is refused to be opened.

Dalt. Sh. 353; Crom. 47. (b) But upon an attachment for a contempt, &c., issuing out of Chancery, it is said the officer cannot break open the door; but *quære*. Dalt. Sh. 353. || It would seem that sequestrators may do so. 2 Meriv. R. 395.||

So, in the execution of a commission of bankruptcy, the commissioners, or any officers deputed by them, may break open the houses, chambers, shops, warehouses, doors, trunks, or chests of the said bankrupt, wherein the said bankrupt or any of his goods or estate shall be, or reputed to be.

21 Jac. 1, c. 19; Dalt. Sh. 353.

By the 3 & 4 Jac. 1, c. 35, it is enacted, "That upon any lawful writ, warrant, or process awarded to any sheriff or other officer for the taking of any popish recusant standing (c) excommunicated for such recusancy, it shall be lawful, if need be, to break open any house."

(c) Cannot otherwise break open a door or an *excommunicato capiendo*. Cro. Eliz. 747.

Where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant by a constable or private person, it is lawful to break open doors in order to apprehend him; (d) but, where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day, that no one can justify the breaking open doors in order to apprehend him.

2 Hawk. P. C. c. 14, § 7, and the authorities there recited. || (d) *Qu.* Whether a demand of admittance is necessary in these cases, as it clearly is in cases of misdemeanors? 2 Barn. & A. 592. *Semble*, that it is. 2 Hale, P. C. 117, Foster on Hom. p. 3, 20. *Per* Bayley, J., 2 Barn. & A. 592.||

It is said to have been resolved, that where justices of the peace are by virtue of a statute authorized to require persons to come before them to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors of the persons who shall be named in any warrant made in pursuance of such statute, in order to be brought before the justices to take such oath, because such warrant is not (e) grounded upon a precedent offence, neither doth it appear that the party either is or will be guilty of any.

2 Hawk. P. C. c. 14, § 11. (e) Upon the ordinary warrant of a justice of peace, if

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not for felony or suspicion thereof, the officer cannot break open the door. Bulst. 146. ||He may, in case of misdemeanor, making a previous demand of admittance. *Lan-nock v. Brown*, 2 Barn. & A. 592; and on process of contempt from any superior court of justice, or from the House of Commons. *Burdett v. Abbott*, 14 East, 157.||

This privilege of a man's house extends only to the (a) owner, but shall not protect any person who flies thither, nor the goods of any person conveyed thither to prevent a lawful execution; and therefore if a *fi. fa.* be directed to the sheriff to levy the goods of A, and it happen that A's goods are in the house of B, if after request made by the sheriff to B to deliver these goods, he refuse, the sheriff may well justify the breaking and entering his house.(b)

5 Co. 93 a; Sid. 186. (a) That is for such person who lies there. Hob. 62. ||(b) But not unless the goods are fraudulently brought there; for Lord Coke, in 5th R. 93, lays it down that the privilege of a man's house extends to his own proper goods, and those which are *lawfully and without covin there*; and it was so laid down by Best, C. J., *Rex v. Conolly*, Hertford Spring Ass. 1824; and see *Johnson v. Leigh*, 6 Taunt. 246, and *Foster*, 320.||

In a writ of seisin or *habere facias possessionem* in ejectment, the sheriff may justify the breaking open the door, if he be denied entrance by the tenant; for the end of the writ being to give the party full and actual possession, consequently, the sheriff must have all power necessary for this end: besides, in this case, the law does not look upon the house as belonging to the tenant but to him who has recovered.

5 Co. in Semaine's case.

It hath been adjudged, that the sheriff on a *fi. fa.* may break open the door of a barn standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close, &c.

Sid. 186; Keb. 698, *Penton v. Browne*.

So, on a *fi. fa.*, when the sheriff or his officers are once in the house, they may break open any (c) chamber-door or trunks for the completing the execution.

Brownl. 50; 2 Show. 87, pl. 78; Comb. 17, 327. (c) That this must be after request and refusal. Palm. 54. ||Inner doors may be broken without demand of admittance, in order to seize goods within them under a writ of execution. *Lloyd v. Sandilands*, 8 Taunt. 250; S. C. 2 Moo. 207; *Hutchinson v. Birch*, 4 Taunt. 619. And inner doors of the defendant's house may clearly be broken under civil process against him if the defendant is there, and *come semble*, upon *reasonable suspicion* that he is there; and *qu.* whether in such case a demand of admittance is necessary? *Ratcliffe v. Burton*, 3 Bos. & P. 223. But the sheriff, under civil process, cannot justify breaking the inner doors of the house of a stranger, on mere suspicion that the defendant is there; and this, apparently, whether he demand admission or not. *Johnson v. Leigh*, 6 Taunt. R. 246; and vide 2 Moo. 207; 2 Barn. & A. 592.||

So, if the sheriff's bailiffs enter the house, the door being open, and the owner locks them in, the sheriff may justify breaking open the door for the enlarging and setting at liberty the bailiffs; for, if in this case he were obliged to stay till he could procure a *homine replegiando*, it might be highly inconvenient: also, it seems, that in this case the locking in the bailiffs is such a disturbance to the execution that the court will grant an attachment for it.

Cro. Ja. 555; Roll. Rep. 132; Palm. 52, *White v. Wiltshire*.

So, if one be arrested, and after escape into his house, the sheriff may

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break the doors to take him ; as, where one opened his casement, and the sheriff took him by the hand, &c.

Roll. Rep. 138 ; Palm. 54 ; 6 Mod. 173. *β* Allen v. Martin, 10 Wend. 300.*g*

So, where an affray is made in a house in the view or hearing of a constable, or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray, in the first case, or to apprehend the affrayers in the other, in either case he may break open the doors.

Bro. *False Imprisonment*, 6 Com. 170.

β The sheriff has a right to enter the house of the defendant in a writ of replevin, in order to search for goods, and he is not a trespasser, although they may not be found there.

Kneass v. Fitler, 2 S. & R. 263.*g*

4. *Where and when he can execute the Writ.*||

|| The authority of the sheriff is confined to the county whereof he is sheriff. If the sheriff, therefore, execute a writ out of his county, he is a trespasser ; but, on a writ of *habeas corpus*, the sheriff has power to carry a prisoner in his custody through other counties, (*a*) and on fresh pursuit the sheriff may in another county retake a person who has escaped from his custody. (*b*) Thus, if the sheriffs of London, on a writ directed to them, make an arrest in the county of Middlesex, or *vice versâ*, the arrest is void. (*c*) It is not lawful for the sheriff to make an arrest or execute a writ in a court of justice whilst the justices are sitting, or in any of the royal palaces, (*d*) or the Tower. (*e*) If the sheriff enter a franchise, the owner of which has the execution and return of writs, and execute a writ without a *non omittas* clause therein, the execution is good, (*g*) although the sheriff may be liable to an action at the suit of the owner of the franchise for an infringement thereof. (*h*)

(*a*) 2 Roll. Rep. 163 ; Plowd. 37 a. (*b*) Dalt. 23. (*c*) Hammond v. Taylor, 3 Barn. & A. 408. (*d*) 10 East, 578 ; 1 Camp. 475 ; *sed* vide 7 Taunt. 311. (*e*) 2 Chit. R. 51, (*g*) 3 Barn. & A. 502 ; 7 Taunt. 311. (*h*) 9 East, 330.

The sheriff may execute the writ at any time after it is delivered to him, and before and on the return-day of the writ. (*i*) The sheriff cannot execute process by original between the return-day and the *quarto die post*, (*k*) and for so doing he would be a trespasser, as the four days between return-day and *quarto die post* are merely *ex gratiâ*. (*l*) But where the sheriff held an inquest on the return-day of the writ, but the jury did not give their verdict for two or three days afterwards, the writ was held to be well executed. (*m*)

(*i*) Cro. Eliz. 180, 468 ; 3 Salk. 51 ; 2 Roll. Abr. 278 ; 6 Mod. 130 ; Burr. 812 ; Ld. Raym. 1449. *β* The sheriff is required to execute all process which comes to his hands, with the utmost expedition that the circumstances admit. Lindsay's Executor v. Armsfield, 3 Hawks, 548 ; Tucker v. Bradley, 15 Conn. 46.*g* (*k*) 2 Roll. Abr. 278, pl. 10 ; 1 Lev. 143. (*l*) 2 Barn. & C. 626 ; 4 Dow. & Ry. 160. *β* If the sheriff levy an execution after the return-day, he will be a trespasser. Vail v. Lewis, 4 Johns. 450.*g* (*m*) 2 Roll. Abr. 278, pl. 5 ; Ld. Raym. 1449. ||

β A sheriff's officer, who is a party to the suit as guardian to the plaintiff or otherwise, cannot execute a replevin, but he may accompany another officer in order to show the property.

Kneass v. Fitler, 2 Serg. & R. 263.*g*

(N) How to execute Writs. (*Sunday*.)5. *Whether he can execute his Writ on a Sunday.*

This depends on the statute 29 Car. 2, c. 7, § 6, by which it is enacted, "That no person upon the Lord's day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree, (except in cases of treason, felony, or breach of the peace,) but that the service of every such writ, process, warrant, order, judgment, or decree, shall be void to all intents and purposes whatsoever; and the person or persons so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, process, warrant, order, judgment, or decree."

||Vide vol. iv. p. 632, tit. *Heresy*, for the decisions on the other sections of this statute.||

In the construction hereof it hath been holden, that a citation out of the spiritual court may be served on a Sunday, by fixing the same to the church door, and that the general words of this statute do not extend to such process.

5 Mod. 449; Ld. Raym. 706; Carth. 504, S. C. ||Vide vol. iv. p. 632.||

It hath been adjudged, that a person may be taken on an escape warrant on a Sunday, because in nature of fresh pursuit, which may be on a Sunday, and this only in nature of it, though it be by a new method; and this is no original process, but the party is in still upon the old commitment continued down.

2 Salk. 626, pl. 7, *Parker v. Sir William Moor*; 6 Mod. 95, S. C.

That no indictment can be taken on a Sunday; and hence it hath been holden, that in every caption of an indictment taken in a sheriff's torn or court-leet, the day whereon it was taken ought to be set forth, that it may appear not to have been on a Sunday.

2 Saund. 290; Vent. 107; 2 Keb. 731.

As this statute makes all arrests unlawful, it seems the better opinion, that the killing an officer who endeavours to arrest a person on a Sunday is not murder, though it had been otherwise had such public officer been killed on an ordinary day.

Hawk. P. C. c. 32, § 58.

That the arrest is void, so that the party may have an action of false imprisonment.

Salk. 78, pl. 1; 5 Mod. 91.

||And no waiver by the party can cure the irregularity.

Taylor v. Phillips, 3 East, 155.

And an arrest on Sunday on a *capias utlagatum*, or for non-payment of a penalty on a conviction, is void.

Barnes, 319; 1 Term R. 265.

The sheriff cannot retake a party on Sunday after a voluntary escape.

Barnes, 373; 5 Term R. 25.

So, where A was arrested at suit of B, and discharged, the sheriff not knowing that there was also a detainer in his office at suit of C, and on Sunday following he was arrested at C's suit, the court held this arrest void.

Barnes, 373; 5 Term R. 25.||

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Also the court will relieve on motion, and discharge from such arrest without putting the party to his *audita querela*.

6 Mod. 95. [*Note*, in the preceding case, the court refused to relieve upon motion; and in this case Holt said, it must be by *audita querela*; the arrest on a Sunday being a fact traversable.]

§ The sheriff may proceed on Sunday by distress to enforce the penalty, authorized by a revenue act of the legislature, for peddling without a license.

Cowles v. Brittain, 2 Hawks, 204.*g*

6. *In what Manner he is to do Execution; ||and herein of the several Writs of Execution, and what may be seized under each.*||

|| FIERI FACIAS AND LEVARI FACIAS. ||—The sheriff in doing execution must be careful that he observes the direction of the writ, which is his authority, as in executing a *fi. fa.* or *levari fa.*, by the first of which the goods and chattels of the debtor only can be taken in execution; and though by the latter the sheriff may not only sell the goods, but also collect the debt out of the profits of the land, as corn or grass growing thereon, yet in neither case has he authority to meddle with the debtor's lands, so as to sell or deliver such lands to the creditor in satisfaction of his debt.

5 Co. 11; Co. Lit. 290 b; 2 Inst. 453; Plow. 441; Finch, 101; Godb. 290; Comb. 470. ||*Vide tit. Execution, (C), vol. iii. 686.*||

And as he has not by these writs a power to dispose of the freehold or inheritance, hence it hath been adjudged, that the sheriff cannot deliver a furnace annexed to a freehold in execution; for though the writ gives the sheriff authority to levy the debt upon the goods and chattels of the debtor, and this is indeed a chattel, yet it does not give the sheriff any authority to break or disunite any thing from the freehold, which he cannot do unless particularly empowered by writ.

Owen, 70; Roll. Abr. 891; Off. of Ex. 87.

But it hath been held, that if a soap-boiler or other trader, being an under-tenant, for the convenience of his trade puts up vats, coppers, tables, partitions, and paves the backside, &c., upon a *fi. fa.* against him, the sheriff may take them in execution, in the like manner as the lessee himself might have removed them during the term.

Salk. 368, *per* Holt, C. J., at *nisi prius*. ||Fixtures annexed to the freehold which would go to the heir cannot be seized under a *fi. fa.* Winn v. Ingilby, 5 Barn. & A. 625; 1 Dow. & Ry. 247. Aliter, fixtures removable by the tenant during the term. Salk. 368. Buildings of brick and mortar, erected by the tenant on the land during the term, for the purposes of agriculture, are not removable by tenant, and therefore not seizable under a *fi. fa.* Elwes v. Mawe, 3 East, 44; and see Steward v. Lombe, 4 Moo. 281; 1 Brod. & B. 506. If erected for purposes of trade they are removable, and therefore seizable, being accessory to a personal matter, Penton v. Robart, 2 East, 87, unless, indeed, the tenant covenant to yield up *all* erections made during the term. Thresher v. E. London Water-works Company, 2 Barn. & C. 608; 4 Dow. & Ry. 62; Naylor v. Collinge, 1 Taunt. 19.—An ornamental conservatory erected on a brick foundation is not removable. Buckland v. Butterfield, 2 Brod. & B. 54; 4 Moo. 440.—So also the machinery of a mill. Farrant v. Thompson, 5 Barn. & A. 826; 2 Dow. & Ry. 1.—So, ranges, ovens, and pots. Winn v. Ingilby, 5 Barn. & A. 625; 1 Dow. & Ry. 247. *Secus*, parts of a machine usually valued between outgoing and incoming tenants. Davis v. Jones, 2 Barn. & A. 165. If tenant sever fixtures which he has no right to remove, still they cannot be seized. Farrant v. Thompson, *ubi sup.*||

Otherwise, where such trader makes hearths and chimney-pieces to complete the house, and not for the conveniency of his trade.

Salk. 368, *per* Holt.

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The sheriff on a *fi. fa.* or *lev. fa.* cannot sell an estate for (a) life, which being a freehold, can no more be affected by these writs than any estate of inheritance.

Dalt. Sh. 145; 3 Co. 13. (a) But it is said, that since the statute 29 Car. 2, c. 3, an estate *per auter vie* may be sold by the sheriff on a *fi. fa.* Comb. 391.

On these writs the sheriff may (b) dispose of leases for years, which are but chattels, be they of ever so long continuance: also, upon an *elegit*, the sheriff may either extend a term for years, that is, may deliver a moiety thereof to the plaintiff as part of the lands and tenements of the defendant, or may sell it absolutely, as part of his personal estate.

4 Co. 74; Dalt. Sh. 137; 8 Co. 171; 2 Inst. 395 (b) But, if a sheriff on a *fi. fa.* sells a lease or term of a house, he cannot turn the lessee out of possession, but the vendee in such case must bring his ejectment. 2 Show. R. 85, pl. 74. {Addis. 203, Pennsylvania v. Kirkpatrick.} [He cannot perhaps, where there is a tenant in possession, and the execution is against the landlord, whose term is to be sold, turn the tenant out of possession; but the case might be very different where *the debtor himself* is in possession. In the case of Shower, the proceeding was under the statute for a forcible entry, which by no means negatives the power of the sheriff to put the tenant out of possession peaceably. Taylor v. Cole, 3 Term R. 292.] {1 Johns. Rep. 42, M'Dougal v. Sitcher.} || And in Rogers v. Pitcher, 6 Taunt. 207, Gibbs, C. J., said there was no case in which a party might maintain an ejectment in which he might not enter; and see Turner v. Meymott, 1 Bing. 158; 7 Moo. 574. || β The sheriff may sell a term in goods and chattels upon an execution against the lessee. Van Antwerp v. Newman, 2 Cowen, 543.g

If the sheriff, reciting that the defendant hath a term for years, sells it by virtue of a *fi. fa.*, this sale is good; for it cannot be intended that the sheriff should certainly know the beginning and end of the term.

Cro. Eliz. 584; 4 Co. 74, Palmer's case.

[So, in pleading the taking of a term under a *fi. fa.*, it is sufficient to state that the party was possessed of a certain interest in the residue of a certain term of years.

Taylor v. Cole, 3 Term R. 292.]

But, if undertaking to recite it, he mistakes, and sells the said term, it is a void sale, unless there be general words, all the interest, &c., of the defendant therein.

4 Co. 74 a.

But a term cannot be extended without showing the certainty thereof, because after the debt paid the party is to have his term again if any part thereof remains.

4 Co. 74 a.

|| Corn and other crops growing or sown on the ground, which go to the executor, may be sold under a *fi. fa.*; (c) but clover, rye grass, or artificial grass, newly sown and growing under corn, cannot be seized on a *fi. fa.* (d)

(c) Dalton, 556. (d) 56 G. 3, c. 50, § 7.

Where a *fi. fa.* was delivered to the sheriff against the tenant of certain land, whereon certain crops were standing, and before the return of that writ a writ of *habere facias possessionem* of the same land was delivered to the sheriff, issued on an ejectment on a demise laid anterior to the teste of the *fi. fa.*; it was held that those crops were not liable to be taken on the *fi. fa.*, inasmuch as the tenant was a trespasser from the day laid in the declaration in ejectment.(e) Where corn sold under a *fi. fa.* is not ripe, the vendee has a reasonable time after it is ripe

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to cut it and carry it away; and whilst remaining on the land it is not liable to a distress for rent, for during all that time it is considered *in custodia legis*; the goods in the vendee's possession being protected in order to render the execution available, although the sheriff's duty ended on the execution of the bill of sale.(e) Formerly the duty of the sheriff in the sale and disposition of corn or other crops, or manure, taken on a farm under a *feri facias* against a tenant, was the same as in the sale of any other goods and chattels; but now, where there is any covenant or contract in writing between landlord and tenant, stipulating that such crops, &c., shall be spent on the farm,—(which act does not relate to produce which the tenant may, consistently with his lease, remove from the farm,)—the sale of such goods is regulated by the statute 56 G. 3, c. 50, the first section of which provides, that where there is a covenant or contract in writing (and thereof the sheriff has notice) for spending agricultural produce upon the farm, the sheriff shall not remove the crops, &c., from the farm for the purpose of sale. § 2. The tenant is required to give notice to the sheriff of such covenants or written agreements, and the sheriff is required to give notice by post to the landlord or his agent of his possession of such agricultural produce, and in case of the silence of the landlord or agent, the sheriff must delay the sale till the latest period he can do; and where there is a covenant or written contract between landlord and tenant, the sheriff is to make an agreement with his vendee that he is to consume the produce, according to the terms of such covenant or written agreement. § 3, 4, 6, 10. If there be no such covenant or agreement, then the vendee is to stipulate to spend the produce of the farm, according to the custom of the country, and the vendee is allowed the use of the barns, &c., on the farm for that purpose, without the sheriff or vendee being a trespasser, nor are such crops remaining on the premises liable to a distress for rent. The sheriff is to allow the landlord to bring actions in his name against the vendee for breaches of the agreement in assigning the crops, &c., the landlord indemnifying the sheriff before commencing his action.

(e) *Hodgson v. Gascoigne*, 5 Barn. & A. 88. (g) *Peacock v. Purvis*, 2 Brod. & B. 362; 5 Moo. 79. See also as to execution by *feri facias*, tit. *Execution*, (C), vol. iii. p. 686.]]

If one be tenant for years without impeachment of waste, and a *fi. fa.* come out against him, the sheriff cannot cut down and sell timber; for the tenant had only a *power* so to do, and no interest, as he hath in standing corn, which upon a *fi. fa.* against him the sheriff may sell.

Salk. 368.

The sheriff, in executing a *fi. fa.* or *levari fa.*, must be careful that the absolute property of the goods be in the debtor; and therefore if the sheriff takes the goods of a stranger, though the plaintiff assures him they are the defendant's, he is a (a) trespasser, for he is obliged at his peril to take notice whose the goods are, and for that purpose may empanel a jury to inquire in whom the property of the goods is vested.(b) And this it is (c) said shall excuse him in an action of trespass.

Keilw. 119; Bro. tit. *Trespass*, 99. ||(a) Where the goods of a woman were seized under an execution against a man with whom she lived as her husband, the marriage turning out to be void, it was held the woman might recover the value of the goods in trover against the sheriff. *Glasspoole v. Young*, 9 Barn. & C. 696; and see 2 Stark Ca. 366.]] [(b) This inquisition, it seems, the courts cannot set aside. *Roberts v. Thomas*, 6 Term. R. 88.] (c) *Dalt. Sh.* 146.

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||But it is now settled that such an inquisition, finding the property in a third person, is not admissible evidence for the sheriff in an action against him for returning *nulla bona* to a *fi. fa.*; though it might perhaps be evidence, if the question were, whether the sheriff had acted maliciously.

Glossop v. Pole, 3 Maul. & S. 175; Ibid. 177.

And the proper course is for the sheriff, in such cases, to apply to the court: for wherever the property in goods seized is disputed, the court will, on suggestion of a reasonable doubt, enlarge the time for the sheriff to make his return until the right be tried, or until one of the parties has given a sufficient indemnity to the sheriff or to his officer.

4 Moo. 439; 1 Taunt. 120; 1 Chitt. 294, 643; 2 Black. R. 1064; 1 Bing. 71; 7 Moo. 368; 7 Term R. 174; 4 Taunt. 585; 1 Moo. 43; 7 Taunt. 294.

It is, however, quite discretionary in the courts to interpose or not, and upon what terms they will protect the sheriff; and if the law is clear as to the property, they will not interfere.

Ibid.; and see Watson on Sheriffs, ch. 10, § 6.||

The sheriff cannot take in execution goods pawned or gaged for debt, nor goods demised or letten for years, (a) nor goods distrained, (b) nor goods before seized upon an execution.

Bro. Pledges, 28; Cro. Car. 149; Roll. Abr. 893; [Tully v. Peachey, Hil. 23 G. 3; 4 Term R. 640]. ||(a) Subject, however, to the rights of the pawnee or lessee, the sheriff may sell the goods so pawned or leased. Tidd's Pract. 1042, 8th ed.) Such goods cannot, however, be seized, for the pawnor, or lessor has no present right of possession. 8 East, 476; *aliter*, if the lease of the goods be void. 15 East, 607. If fixtures or trees demised with land are severed by the tenant, they immediately vest in the lessor, and are liable to be taken on an execution against lessor. See 5 Barn. & A. 826.|| (b) Show. Rep. 174; [4 Term R. 640.]—Unless such first execution were by fraud. 7 Mod. 37, [or the goods were not *legally* seized. 4 Term R. 651.]

||On a *feri facias* against an executor for his own debt, the goods of the testator in the hands of the defendant cannot be taken in execution; but if an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt.

Farr v. Newman, 4 Term R. 621; Quick v. Staines, 1 Bos. & Pul. 293.||

Upon a *levari fa.* to levy the yearly value of 55*l.* found by inquisition on an (c) outlawry upon a judgment in debt, the beasts of a stranger *levant* and *couchant* on the land may be taken, for they are the issues of the land; and were it otherwise, it would be in the power of the party by agisting his lands to defeat the king of the benefit of the outlawry.

Salk. 395; 5 Mod. 112; Carth. 441; Skin. 617, pl. 13; Comb. 434; Ld. Raym. 305, 469, Briton v. Cole. (c) But where, on a *fi. fa.* out of the Exchequer for the Queen's debt, the sheriff took the beasts of J S, being *levant* and *couchant* on the land of the debtor, and sold them, this in an action of trespass was held not to be lawful: but it was held that they might have been distrained for the Queen's debt. Cro. Eliz. 431; Roll. Abr. 159; and vide Hard. 101.

If there are two coparceners of goods, and a judgment is given against one of them, the sheriff upon a *fi. fa.* upon this judgment must seize all, because their moieties are undivided; for if he seizes but a moiety, and sells that, the other coparcener will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided; so that the vendee will be tenant in common with the other partner.

Salk. 392, pl. 1; Show. 173; Comb. 217, Heydon v. Heydon; || Morley v. Strombon, 3 Bos. & Pul. 254. This rule applies as well where the shares are unequal as where they are equal.||

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|| But where the goods of two partners are taken in execution against one of two partners, on a subsequent execution against the other partner, the sheriff must hold the goods as seized, one moiety for the execution against one partner, the other moiety for the execution against the other; for if to the writ against the second partner he return *nulla bona*, it is a false return. (a) In one case, where the sheriff had sold the whole of the partnership property on an execution against one partner, the Court of King's Bench granted a rule for the master to take an account of the partnership property belonging to the other partner, and that the sheriff should pay over to the assignees of such partner the sum found due to them. (b) But where the sheriff seized, upon a *fi. fa.* against one of several partners, his undivided share of the partnership effects, the Court of Common Pleas refused to refer it to the master to inquire what share the defendant had in the partnership effects seized. (c) And the court, under similar circumstances, on application by the partnership creditors, refused to enlarge the time for the sheriff to return the writ, until an account might be taken of the several claims upon the property. (d)

(a) *Buckhirst v. Clinkard*, 1 Show. 174. (b) *Eddie v. Davidson*, Doug. 650. (c) *Chapman v. Kooops*, 3 Bos. & Pul. 288. (d) *Parker v. Pistor*, 3 Bos. & Pul. 288.

A person had an annuity for twenty-one years, granted by Queen Elizabeth, payable by her receiver of her court of wards, which upon a *fi. fa.* upon a judgment against the grantee was extended and sold; and it was resolved the extent and sale was good; for being an annuity certain for years certain, and payable by the receiver, it is in nature of a rent-charge for twenty-one years, and is grantable over and vendible, and not like an annuity which chargeth the person only.

Cro. Ja. 78, *York v. Twine*. || In Doct. & Stu. f. 53. Dalt. 127, it is said an annuity cannot be taken in execution, because nothing can be so taken that cannot be granted or assigned. ||

On a writ of *fi. fa.* the whole personal estate is liable to execution, except wearing apparel; and it hath been held, that (e) if the party hath two gowns the sheriff may sell one of them.

2 Co. 12. (e) Comb. 356, *per Holt*.

Upon a writ of *fi. fa.* the sheriff cannot (g) deliver the goods of the defendant to the plaintiff in satisfaction of his debt, but the goods are to be sold, and the money in strictness is to be (h) brought into court.

Cro. Eliz. 504, *Thomson v. Clerk*, adjudged. Lutw. 589, S. P.—Where a sheriff after a *fi. fa.* delivered to him pays the plaintiff out of his own money, it is made a question by Hobart, whether the sheriff may levy the money on the defendant. Hob. 207. (g) Though they cannot be delivered to the plaintiff, they may be sold to him. Comb. 452; || 1 Bos. & Pul. 360. || Admitted to be the practice to make a bill of sale of the goods to the plaintiff. Carth. 419.—But the sheriff, though he pays the plaintiff out of his own proper money, yet he cannot keep the goods to his own use, for the authority by which he acted was to sell the goods. Noy, 107; Lutw. 589. (h) For it is not of record without. Godb. 147.—But the law seems otherwise; for though the writ be *ita quod habeas*, &c., yet the sheriff may return that he hath paid the money to the plaintiff. 2 Show. Rep. 87, pl. 78; 3 Lev. 204.

|| In order to compel the sale of goods, where the same sheriff continues in office, it is usual to issue a writ of *venditioni exponas*. This writ should be sued out without delay; for if, after the sheriff makes his return to a *fi. fa.*, the plaintiff lies by without proceeding against the sheriff, and the goods should in the mean time be taken on an extent, or the defendant become bankrupt, and the sheriff deliver them to assignees, the court will

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quash a writ of *distringas* obtained against the sheriff.(a) After the delivery of the *venditioni exponas* to the sheriff, it is his duty to sell the goods at all events, for the best price that can be got for them.(b) But the Court of Common Pleas refused in one case to grant an attachment against the sheriff, for returning to a *venditioni exponas*, that the goods remained in the hands for want of buyers.(c) The proper mode of proceeding, if the sheriff do not sell on or before the return of the *venditioni exponas*, is to sue out a *distringas* against him, directed to the coroner; and if he do not sell the goods, and pay over the money before the return of that writ, he shall forfeit issues to the amount of the debt.(d)

(a) *Ruston v. Hatfield*, 3 Barn. & A. 204; *Clutterbuck v. Jones*, 15 East, 78. And if the act of bankruptcy was prior to the seizure on the *feri facias*, the sheriff is not concluded by his return of goods in hands for want of buyers. *Bridges v. Walford*, 6 Maul. & S. 42. (b) See 3 Camp. 524; Cowp. 405. (c) *Leader v. Davis*, 1 Bos. & Pul. 359. (d) *Clerk v. Withers*, 6 Mod. 300. βOn a *distringas fi. fa.* the sheriff cannot distrain the very property for which the execution issued; nor can he seize and sell it to pay the damages mentioned in the execution. *Jordan v. Williams*, 3 Rand. 501.g

If the sheriff return that he has seized goods on a *fi. fa.*, which remain unsold for want of buyers, and go out of office, the plaintiff may sue out a *distringas nuper vicecomitem*, by which writ the new sheriff is commanded to distrain the old sheriff to sell the goods, and have the money in court at the return.(e) The sheriff's authority to sell the goods, we have seen, is not derived from the *distringas*, for the sheriff who has seized goods may sell them after he is out of office, but this writ is compulsory upon him.(g) If there has been laches on the part of the plaintiff, or collusion between him and the officer, the court will not grant the *distringas*.(h) And if a commission of bankrupt issue against the defendant on an act of bankruptcy committed before the seizure of his goods under a *fi. fa.*, the court will not grant a *distringas* after a return of goods in hands unsold, for in such case the sheriff is not concluded by his return as to the property in the goods being in the defendant.(i) Where on the *distringas* the new sheriff returned that he had distrained issues to the value of 40s., and in consequence of the delay further costs had been incurred, the court increased the issues to the amount of 100l. to meet the costs incurred.(k)

(e) See the form of the writ, 2 Saund. 47 q, note. (g) 6 Mod. 299; 1 Salk. 323; Ld. Ray. 1074. (h) *Rushton v. Hatfield*, 3 Barn. and A. 204. (i) *Clutterbuck v. Jones*, 15 East, 78; *Bridges v. Walford*, 6 Maul. & S. 42. (k) *Phillips v. Morgan*, 4 Barn. & A. 652; and see *Watson on Sheriffs*, p. 190.||

||PRIORITY OF SEVERAL EXECUTIONS.||—If two writs of *fi. fa.* bear teste the same day, the sheriff at common law, and now since the statute (l) 29 Car. c. 3, is bound to execute that which was first delivered to him; ||unless the first writ was fraudulent, and then he should execute the other. And if the sheriff, after making a seizure, does not keep possession, but leaves the defendant in possession of the goods, this is strong evidence to show that the first execution was fraudulent.(m)||

Salk. 320; || *Hutchinson v. Johnson*, 1 Term R., 729; *Sawle v. Paynter*, 1 Dow. & Ry. 307. || (l) By which it is enacted, that no *fi. fa.* or other writ of execution shall bind the property of the goods, but from the time such writ shall be delivered to the sheriff, under-sheriff, or coroner, to be executed; and for the manifestation of the time, the sheriffs, &c., their deputies and agents, upon the back of the said writ shall endorse the day and year when received.—This must be intended as to strangers who might have a title to the goods between the teste of the writ and delivery thereof to the sheriff, but as to the party himself, his executors and administrators, the goods

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since the statute, as before, are bound from the teste. 2 Vent. 218; Comb. 33; 2 Show. 485; 6 Mod. 225. ||(m) Bailey v. Windham, 1 Wils. 44; Kempson v. Macaulay, Peake's Ca. 66; and see 1 Maul. & S. 711; Holt, Ca. 335; 1 Bing. 71.||

Where since the statute A delivered a *fi. fa.* to the sheriff at nine in the morning, and after at ten the same day B delivered another, desiring him forthwith to execute it, which he did, and sold the goods, and after executed A's *fi. fa.* on the same goods, it was held the first execution was good, and A had remedy only by action against the sheriff.

Salk. 320, pl. 4; Ld. Raym. 251; Carth. 419, Smalcom v. Buckingham; 5 Mod. 376, S. C.; Comb. 428, S. C.; and Holt inclined there should be no fraction of a day, and that the sheriff had his election, Carth. 419, S. C.; the last bearing *teste* first: and *per* Holt, where a *fi. fa.* is delivered the sheriff to-day and another to-morrow, and he executes the last first by making sale of the goods, such sale will stand good, and he who delivered the first writ hath remedy only by action against the sheriff.—But, if two writs are delivered the sheriff the same day, he ought to give preference to that which was first delivered; but, if he executes the last first, the execution cannot be defeated by a subsequent execution of the first, but the party concerned in the first is put to his action against the sheriff; ||and see 1 Term R. 731, note, Payne v. Drewe, 4 East, 523.||

But if A, when he delivered his writ, had ordered the sheriff to stay execution till the next day, he could have had no action against the sheriff.

Salk. 320, pl. 4; Ld. Raym. 251.

|| But if the sheriff merely seize, but has not sold under the writ last delivered, the sheriff may apply that levy to the first writ, though no warrant had issued thereon.

Jones v. Atherton, 7 Taunt. 56; 2 Marsh, 375, Hutchinson v. Johnson, *ubi sup.*

Therefore, where two writs of *feri facias* were in the sheriff's hands at the same time, against the same defendant, at suit of different plaintiffs, upon the writ first delivered the officer entered; and whilst in possession, the officer under the second writ entered, and remained in possession till the goods were sold, which were not enough to satisfy the first writ: before the sale the defendant gave notice to the sheriff that he would move to set aside the first *fi. fa.* and the judgment whereon it was founded; and upon that writ being set aside, the sheriff paid the money over to the defendant according to the rule: it was held that, on the first writ being set aside, the proceeds of the sale were liable to satisfy the second writ, and that under those circumstances a return of *nulla bona* to the second writ was a false return.

Saunders v. Bridges, 3 Barn. & A. 95. The court would have allowed the sheriff to pay the money into court, or to retain it till indemnified, if he had applied for that purpose.

As the king is not named in the statute of frauds, an extent binds the goods from the *teste* of that writ; and if the extent be tested before, or on the day of delivery to the sheriff of a writ of *feri facias*, the extent shall have priority over the subject's execution, although it be not delivered to the sheriff until after the *feri facias*, provided it be delivered before the goods are actually sold under the *feri facias*: if the goods are sold under the *fi. fa.* it is otherwise, for by the sale the property is altered. (a) And the Court of Exchequer (b) decided in one case contrary to the decisions of the King's Bench (c) and Common Pleas, (d) that if a *feri facias* be delivered to the sheriff, and after a seizure of goods, but before sale, an extent be delivered to the sheriff, tested after the delivery of the *feri facias*,

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the extent shall be preferred; and, in the King's Bench, process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained, entitles the king's execution to priority within the stat. 33 H. 8, c. 39, § 74, before the execution of a subject issued on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the commencement of the king's process, the king's writ having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. (e)

(a) Swain v. Morland, 1 Brod. & B. 376; S. C., 3 B. Moo. 740. (b) Rex v. Wells and Alnutt, 16 East, 278; Rex v. Sloper, 6 Price, 114, 144; 8 Price, 293. See also 1 Saund. 219 f. n. (i). And see as to the crown's priority under the stat. 33 H. 8, c. 39, § 74, 1 East, 338. (c) Rorke v. Dayrell, 4 Term R. 402. (d) Uppom v. Sumner, 2 Black. R. 1251. (e) Butler v. Butler, 1 East, 338; 8 Price, 384.

As the sheriff cannot take the goods of a stranger, if the defendant becomes bankrupt before the seizure, the goods of the bankrupt cannot be taken on a *fi. fa.* against him, for by the bankruptcy the property in them vests in the assignees. (a) And where the sheriff having seized the goods of the defendant, on a *fi. fa.* delivered to him before the defendant's bankruptcy, afterwards sells goods enough to satisfy that execution, and also another writ delivered to him after the bankruptcy of the defendant, the sheriff is liable to the assignees in an action of trover for the amount of the goods sold to satisfy the second writ. (b) But if the seizure of the goods and the act of bankruptcy happen on the same day, it is open to inquire at what time of day the goods were seized, for if the goods were seized at an earlier time of day than the act of bankruptcy, the execution is good. (c) And if the seizure were made two months before the issuing of the commission it is valid, though the act of bankruptcy was before the seizure. (d) But if the sheriff seize and sell the goods before he has notice of the act of bankruptcy, he is excused. (e) And if he sell them after notice, but before a commission sued out, although he may be sued in trover, (g) or for money had and received, yet he is not liable in trespass, for an officer shall never be a trespasser by relation. (h) If the writ be executed on goods which the bankrupt has acquired since the bankruptcy, the execution will be good, if the bankrupt's certificate be not then signed and allowed. (i) Yet if the certificate be allowed at any time before the goods are sold, the court will order them to be restored on motion. (k)

(a) Smalcomb v. Cross, Ld. Raym. 252; Phillips v. Thomson, 3 Lev. 69, 191. (b) Stead v. Gascoigne, 8 Taunt. 527. (c) Thomas v. Desanges, 2 Barn. & A. 586; *Ex parte* Dobree, 8 Ves. 82; Saddler v. Leigh, 4 Camp. 197. (d) 6 G. 4, c. 16, § 81. (e) Cooper v. Chitty, 1 Bla. R. 65; S. C. Burr. 20. (g) *Ibid.* *Ibid.* and it lies on the sheriff to show that he paid over the money to the execution creditor before notice of an act of bankruptcy. Lee v. Lopez, 15 East, 230. (h) Smith v. Miller, 1 Term R. 475. (i) 1 Term R. 361; Tidd's Prac. 1049, (8th ed.) (k) Lister v. Mundell, 1 Bos. & Pul. 427; and see 2 Brod. & B. 8; 4 Moo. 350. ||

||ELEGIT.||—Upon an *elegit* the sheriff is to empanel a jury, who are (l) to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements; and upon such inquisition the sheriff is to deliver all the goods and chattels, (except beasts of the plough,) and a moiety of the lands, to the party, and return his writ, in order to record his inquisition in that court out of which the *elegit* issued.

(l) It cannot be done by the sheriff without an inquest, for the words of the statute are, *per rationabile pretium et extentum*, which must be found such by the oaths of twelve men. 2 Inst. 396, Co. Lit. 389; Dyer, 100; 5 Co. 74.

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And although the creditor takes out an *elegit*, yet, if it appears to the sheriff that there are goods and chattels sufficient of the debtor's to satisfy the debt, he ought not to extend the lands.

2 Inst. 395.—But an *elegit* executed upon goods only is not a *fi. fa.*; for a *fi. fa.* is executed by sale by the sheriff, but the *elegit* by the appraisement of the goods by the jury, and delivery to the party. Sid. 184; Lev. 92; Keb. 105. ||As to execution by *elegit*, see further tit. *Execution*, (C) 2, vol. iii. p. 688; and see Watson on Sheriffs, ch. 11.||

When the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety thereof to the plaintiff (a) by metes and bounds.

Cro. Car. 319. (a) If upon an *elegit* the sheriff delivereth a moiety of an house without metes and bounds, such return is ill, and shall be quashed for uncertainty. Carth. 453, per Holt. ||And the objection may be taken at *nisi prius* to an ejectment brought upon the *elegit*. Fenny v. Durrant, 1 Barn. & A. 40.||

If the sheriff on an inquisition upon an *elegit* returns the defendant to have twenty acres in Dale, and twenty acres in Sale, and delivers the twenty acres in Sale for the moiety of the whole, all is void, for he ought to deliver a moiety of the twenty acres in each vill; and this may be avoided in evidence in ejectment brought for the lands. (b)

Lev. 160; Sid. 239. (b) Extent not avoided by omission of lands liable. 16 & 17 Car. 2, c. 5, § 2.

The sheriff on an *elegit* may extend a (c) rent-charge; for the word *land*, which is made subject to the execution, includes all hereditaments extendible: and in this case the party may distrain and avow for the rent though the tenant never attorned; for the law, creating his estate, gives him all means necessary for the enjoyment of it.

Moor, 32, pl. 104. (c) But not a rent-seck. Cro. Eliz. 656.—Nor can the office of filazer be extended, for a man shall not have execution of that which he cannot assign, though he may of this have an assize, *ut de libero tenemento*. Dyer, 7, pl. 10.

|| Before the 29 Car. 2, c. 3, lands held in trust for the defendant could not be extended on an *elegit* issued on a judgment, statute, or recognisance of *cestui que* trust; but by sect. 10, of that act, every sheriff, &c., to whom any writ or precept is directed upon any judgment, statute, or recognisance, is to deliver execution of all such lands, &c., as any other person shall be seised or possessed of in trust for him against whom execution is sued. This act only extends to trusts for the defendant *solely*, and not trusts for him jointly with another person; and the statute applies only to trusts of lands in fee not of *terms*, and does not extend to an equity of redemption.

29 Car. 2, c. 3, § 10; Doe v. Greenhill, 4 Barn. & A. 684; King v. Ballett, 2 Vern. 248; Lyster v. Dolland, 1 Ves. jun. 431; 8 East, 467.||

Lands in (d) ancient demesne upon an *elegit* may by the sheriff be delivered in execution, because the title of the lands is not directly put in plea in the king's court; (e) but the statute of Westm. 2, (13 Ed. 1 st. 1.) which gives the *elegit*, extends not to copyhold lands, for then the lord would have a tenant brought in upon him without his admittance or consent.

(d) Hob. 47; 4 Inst. 270; 2 Inst. 397; Moor, 211, pl. 351; Brownl. 234. (e) 3 Co. 9; Co. Cop. 149; Salk. 368. ||Morris v. Jones, 2 Barn. & C. 242; S. C. 3 Dow. & Ry. 603.||

||HABERE FACIAS POSSESSIONEM.||—Upon the writs of *habere facias seisinam* and *possessionem*, the seisin or possession is usually performed by the

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sheriff, by delivering the party who recovers a twig, bough, clod, &c., of the land; or, if it be of an house, by the delivery of the ring of the door, &c.

Dalt. Sh. 254; Bro. *Seisin*, 7, 14, 30. ||As to the *habere facias possessionem*, see tit. *Execution*, (C) 3 vol. iii. 707.||

But, though this ceremony be used, yet it is held, that in (a) all cases where the writ demands land, rent, or other thing in certain, the demandant after judgment may enter or distrain before any seisin delivered him by the sheriff.

Co. Lit. 34 b. (a) Upon a recovery of a reversion, common, &c., that lie in grant, the recoverer is not in possession until execution, entry, or claim. Co. 94 b, 97 b, 106 b; Moor, 141; Keilw. 108.

But in (b) dower, where the writ demands nothing in certain, the demandant after judgment cannot enter or distrain till execution sued, upon which the sheriff delivers the third part in certain. So, where the wife of one tenant in common demands the third part of a moiety, she cannot after judgment enter till the sheriff hath delivered her the third part, though it is thereby reduced to no more certainty than it was.

Co. Lit. 34 b. (b) In dower the writ was *de tertia parte rectoriae de D.*, and upon that grand *cape* issued, *Cape in manum nostrum tertiam partem rectoriae*, by colour of which the sheriff took the tithes severed from the nine parts, and carried them away with him; and it was agreed by the justices that the same is not such a seizure as is intended by the said writ, but the sheriff by virtue of such writ ought generally to seize, but leave them where he found them; and the court was of opinion to commit the sheriff for such his misdemeanor. Leon. 92.

Where the execution is in the generality without mentioning any thing in particular, the sheriff is to make execution of the right thing at his peril, otherwise he will be a disseisor; for he is bound to take notice thereof, and he hath no warrant from the court but to make execution of the right thing.

Roll. Abr. 664.

A and B tenants in common of a manor, A purchased several freeholds that lay so mixed with the demesne lands of the manor, that they could hardly be distinguished from them; B brings a writ of partition of the manor only; and it was adjudged that partition should be made, and a writ awarded accordingly; upon the execution of which writ A comes to the sheriff and inquest, and acquaints them with the purchase of the freeholds that are not parcel of the manor, and bids them take care how they make partition of all the lands within such a compass, lest they offer violence to their consciences, but does not show them the freeholds distinctly, nor the limits of the manor; which obliged the sheriff to adjourn to a certain day; on which one of the inquest made default, and thereupon the sheriff returns a fine of 40s., with an account of the difficulties they met with, *et ulterius propter brevitatem temporis breve illud exequi non potuit*. It was held, that A ought to show the bounds of the several freeholds that he purchased, or the number of the acres; but if no light or evidence is given by either party to the inquest, and they make partition *de tanto quantum præsuntur et dignoscitur per præsumptiones*, it is good, for they are under an obligation to execute the commands of the court at their peril.

Dyer, 265, pl. 5; Dalt. Sh. 265.

||As to the sheriff's duty on executions against the person, see vol. iii. tit. "EXECUTION;" and see Watson on Sheriffs, chap. 7.||

(O) || Of his Duty on Arrests : And herein,||

1. *Of his Duty in admitting Persons to Bail, and of Securities taken for Ease and Favour.*

THIS depends chiefly on the statute 23 H. 6, c. 9, before which the sheriff was not obliged to take bail, unless the party sued out a writ of mainprize; but he might have taken bail on his own head, and if he had not the body ready according to his return, he was amerced, as he now is, if the plaintiff does not take an assignment of the bail-bond.

Dalt. Sh. 356; and vide head of *Bail*.

This statute hath been always deemed an excellent law, as it frees debtors and secures them from the oppression of sheriffs and their officers, and at the same time prevents such officers from admitting persons to bail not bailable by law, to the prejudice of just creditors; and for this purpose it is enacted, "That sheriffs, under-sheriffs, and other officers and ministers, shall let out of prison all persons in their custody by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass, upon reasonable surety of persons having sufficient within the counties (a) to keep their days, (persons in ward by redemption, execution, *capias*, *utlagatum* or *excommunicatum*, surety of the peace, and all persons committed by special commandment of the justices except,) and no sheriff nor his officers shall take any obligation for any cause aforesaid, or by colour of their office, but only to themselves, nor by any person which shall be in their ward by course of law, but by the name of their office, and upon condition written that the said prisoner shall appear at the day contained in the writs, bill or warrant; and if any sheriffs or officers aforesaid take any obligation in other form by colour of their office, it shall be void.—And all sheriffs, &c., who (b) do contrary to this ordinance, shall lose to the party grieved his treble damages, and shall forfeit 40*l*."

Plow. 67; 23 H. 6, c. 9. ||(a) The bail in London must have sufficient in London, it is not enough that they have sufficient in London and Middlesex. 15 East, R. 320.|| (b) Cro. Eliz. 76, 77.

On the first branch of this statute it hath been adjudged, and admitted in a variety of books and cases, that the sheriff is obliged, in such cases not excepted by the statute, to admit the party to bail, and that if he refuses, an action lies against him by the party injured.

Dalt. Sh. 356, and the authorities *infra*.

||And the statute requiring "*reasonable surety*," no particular number of persons is requisite; and where five sureties were offered, and three of them were worth double the amount of the penalty, but the other two were not worth that sum, and the sheriff refused their bond, he was held liable to an action.

Matson v. Booth, 5 Maul. & S. 223.||

And as he is obliged to admit the party to bail, hence also it hath been adjudged, that if the sheriff return (c) *cepi* on the mesne process *et paratum habeo*, no (d) action lies against him, nor will the court grant an attachment in such case against the sheriff where he had bailed the party; for this he was obliged to do by the statute; and therefore if he is mistaken in his sureties, he is not to suffer in his liberty. So, (e) if the sheriff return *languidus*, where he admitted the party to bail, no action lies against him.

Roll. Abr. 93; Cro. Eliz. 852; Noy, 39, S. C., Bowles v. Lassels. (c) For the return in effect and construction of law is true. Mod. 244; 2 Mod. 83. (d) But in this case the defendant must not demur to the declaration, but must plead the statute. Moor, 428, pl. 596; Cro. Eliz. 400; 2 Keb. 591; Sid. 439; Mod. 57; Vent. 85;

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2 Saund. 155—or upon not guilty may give it in evidence. Sid. 439; Mod. 58; Vent. 85. (e) Noy, 39; Cro. Eliz. 852.

|| If the sheriff's officer on an arrest take an undertaking for the appearance of the party without the plaintiff's assent instead of a bail-bond, and bail be not duly put in, the sheriff is liable to an action for an escape, and the court will not relieve him by permitting him to put in and justify bail afterwards.

Fuller v. Prest, 7 Term R. 109; 1 Bos. & P. 225, S. P. *Sed vide* Allingham v. Flower, 2 Bos. & P. 246.

Nor will the court relieve the sheriff from an attachment for not bringing in the body, bail having been put in and no trial lost, if it appear that he let the defendant go at large without taking a bail-bond: although, otherwise, they will relieve him in such case.

Rex v. Sheriff of Surrey, 7 Term R. 239; Hill v. Bolt, 4 Term R. 352.

And where the bail were put in but not *justified* in due time, and the plaintiff commenced an action for escape against the sheriff for not taking a bail-bond, and the bail justified the day after the action commenced, the Court of C. B. set aside the allowance of bail that the action might proceed.

How v. Lacy, 1 Taunt. 119.

And where the sheriff neglects to take a bail-bond, and an action of escape is commenced, the court will not suffer the sheriff to render the defendant, even though the sheriff has not been ruled to return the writ or bring in the body before the action commenced.

Burn v. Sheriff of Middlesex, 2 Marsh; 261, S. C., 6 Taunt. 554, *nom.* Bird v. Bond.

If the sheriff has taken a bond he cannot be sued for an escape, though on inquiry at the office the sheriff's clerk said there was no bond, for the sheriff is not estopped by this denial; but he may be sued in such case for not assigning it.

Mendez v. Bridges, 5 Taunt. 325.||

But, if the sheriff returns a *cepi corpus* and *paratum habeo*, or *languidus*, where the defendant is at large, without any bail taken, he is not aided by the statute, but an action lies against him for the false return.(a)

Roll. Abr. 807. ||(a) But not if he puts in bail in due time, for that is an answer to the action. 2 Bos. & Pul. 35. And if the sheriff suffer the defendant to go at large without a bond, he may retake him before the return-day. 2 Term R. 172.||

The party at whose suit the arrest was, may either take an assignment of the bail-bond, (which he may now sue in his own name,) or, if he dislikes the security,(b) he may still move to amerce the sheriff; for, the sheriff having returned a *cepi corpus*, it is a breach of duty in him not to bring him in according to his return, for which the court amercies him as one of their officers who has been disobedient to their writ; and because the disobedience is to the writ which is returned and filed, the court amercies him, because it appears on record he has disobeyed the king's writ. But, if the writ be not returned, and the court make an order that the sheriff shall return his writ in four days, as is usual, there the disobedience is to the pronounced order of the court, and consequently a contempt of the court, for which an attachment lies. But, if it be in another term, then there must be a *habeas corpus* upon a *cepi* returned, because the sheriff might be prepared to have him according to his writ the first term; but not being required to have him in court the second term, an *habeas*

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corpus is necessary, and the sheriff on this writ must return the body, or a *languidus*, or a *mortuus*, else he will be amerced.

Vent. 85; Salk. 99, pl. 6; 6 Mod. 122; 2 Saund. 59; Ld. Raym. 435. [(b) If the plaintiff dislikes the security, he should not take an assignment of the bail-bond, for by so doing he discharges the sheriff. Gilb. C. P. 21; 1 Salk. 99; 1 Wils. 223; Williams and Jacques, M. 24 G. 3; but if the same bail be put in above, he cannot afterwards except against them. Tidd's Prac. 153.] {1 Hen. & Mun. 22.

If a sheriff takes an obligation with (a) one surety only, it is good enough, and not void by the statute.

Cro. Eliz. 808, adjudged in Sir William Drury's case. 10 Co. 100, S. C. cited. (a) May take one, two, or more, according to his discretion. Cro. Ja. 286. β The sheriff may, but he is not bound, to insist upon two sureties to a bail-bond; if, however, he take but one, and he prove insufficient, the plaintiff may except. Arrenton v. Jordon, 4 Hawks, 98.g

So, in debt upon an obligation conditioned for the appearance of one arrested on a *capias*, the defendant pleaded that the plaintiff took the obligation from him and a stranger who had nothing, and who did not inhabit within the county, and pleaded the statute 23 H. 6, c. 9, and insisted that for this cause the obligation was void: but upon demurrer to this plea it was held, that this statute was made for the ease of the party to prevent oppression, and the sheriff's insisting upon unreasonable securities; but that it did not alter the law as to the matter of those securities, which the sheriff was still at liberty to take in what manner he pleased, so that he did not vary from the manner prescribed by the statute, or make them oppressive to the party; and here his taking the security in a less strict manner than he might have insisted upon, can be no foundation for the party to make it void.

Cro. Eliz. 808; Sir George Clifton v. Web, 2 And. 175; Moor, 636; Cro. Eliz. 862. Like point adjudged between Cotton and Vale. β A bond given to the sheriff to indemnify him for not returning an execution, is null and void. Greenwood v. Colcock, 2 Bay, 67.g

It is said, that there are only three forms to be observed within this statute: 1st, That the bond be made to the sheriff himself; 2dly, That it be made to him by the name of his office; 3dly, That it be only for the party's appearance at the day.

Cro. Eliz. 862; || 1 Term R. 418; 4 East, 568.|| That it be made to him only by the name of his office, and ought to express the day and place of the party's appearance; and these circumstances being observed, although it be variant in others, it is not material. Cro. Ja. 286, and Dyer, 119, S. P. {If the suit, the court, and the place of defendant's appearance be substantially set forth, it is sufficient. 1 Johns. Rep. 521, Steevens v. Clancey. The writ was to appear before the king, *wheresoever*, &c., and the bail-bond to appear before the king *at Westminster*: this was held to be a substantial compliance with the statute. 9 East, 55, Jones v. Stordy. See 2 Str. 1155; 2 Saund. 60, *in notes*; 1 Sellon. 134, and the cases there cited.} || 1 Dowl. & Ry. 551; 9 East, 55.||

An obligation made to a deputy of a bailiff of a franchise, or to an under-sheriff's deputy, is void by the 23 H. 6, c. 9, for it ought to be in the name of the bailiff or sheriff himself.

Noy, 69, Taverner's case.

The condition of an obligation to save the sheriff harmless on his admitting persons to bail who are not bailable by law, is void by the common law.

Plowd. 67, Dive v. Maningham; 10 Co. 100 b, S. C. cited. {1 Bos. & Pul. 277.}

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{But a bond given to indemnify against an escape *already happened* is good. The bonds which are void under the act, as being given for ease and favour, are those given by a person in custody.

1 Cain. 450, *Given v. Driggs.*}

If the sheriff, for the ease and enlargement of a prisoner, takes a promise to save him harmless, this is within the statute, being within the same mischief, though the statute speaks only of bonds. Also, such promise is void by the common law.

10 Co. 101.

β In general a promise made to a sheriff to indemnify him for doing an unlawful act, or for omitting to perform an official duty, is void.

Denson v. Sledge, 2 Dev. 136. See *Joyce v. Williams*, Tayl. 27.g

On an attachment for a contempt the sheriff cannot take bail, and such contempts are only bailable by the judges of the court from whence the process issued, being in nature of executions; but on an attachment out of Chancery, for want of an answer, the sheriff may bail, being only attachments of process.(a) And herein it seems settled, that if the sheriff take one upon an attachment of process, he is to give a bond of 40*l.* penalty to the sheriff to appear and answer; but, for one taken up in execution after a decree, the sheriff may insist on security proportionable to the duty; but in both cases, on the registrar's certificate that the party has appeared, the sheriff is to deliver up the bond.

M. 9 G. 2, *The King v. Baskerville*, Sheriff of Shropshire; and vide 2 Salk. 608; Stil. 234; Abr. Cas. Eq. 351. [(a) But though the sheriff may perhaps bail in such case, he is clearly not bound to do so; nor will an action lie against him on the above statute for refusing to do so; that statute referring only to process in courts of law. *Studd v. Acton*, 1 H. Bl. 468;] || *Morris v. Hayward*, 6 Taunt. 569.||

An obligation taken by the sheriff of one arrested by virtue of an attachment under the privy seal of the court of requests, was held not to be within the statute; but it was held, that such bond was voidable by duress, such court not having jurisdiction to issue such process, and consequently it could be no warrant to the sheriff to take the body or the obligation. But it was admitted in this case, that the sheriff ought to obey the process out of the court of wards and duchy court.

Cro. Eliz. 646, *Stepney v. Loyd*; and vide 2 And. 122, S. C.

So, if one be arrested in one county, and carried by the bailiff into another, where he gives bond to the sheriff of the county where the arrest was, although this is not void within the statute, yet the party may avoid it for duress; but then he must plead such duress, and rely on it.

Cro. Eliz. 745, *Brown v. Adams*.

A bond to the sheriff, that the party on a *fi. fa.* will pay the money into court at the return of the writ, is not within the statute, because the statute extends to obligations made by persons in custody, nor is such obligation void (b) by the common law.

10 Co. 99 b, *Beawfage's case*. (b) If one taken on a *capias ad satisfaciendum* at the suit of A, assigns a mortgage to the under-sheriff for securing the money to him at a certain day, and is thereupon discharged, and after a new sheriff made he pays the money to the under-sheriff, who re-assigns the mortgage, yet this shall not excuse the escape, for the sheriff had no power to take security, or even the money *Lutw.* 588, 599. But for this vide *Cro. Eliz.* 404; *Mod.* 154; 2 *Jon.* 97; 2 *Lev.* 203; 3 *Keb.* 748; 2 *Show.* 139, pl. 116.

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An obligation taken by the sheriff *pro solutione pecuniæ debitæ* (a) *dominæ reginæ*, on an extent out of the Exchequer, is not within the statute.

10 Co. 100 a. (a) That the king is not bound by the statute. Dyer, 119; 5 Co., Whelpdale's case.

On an indictment of trespass, in which the sheriff is obliged by the statute to admit to bail, yet if the bond is taken in (b) another's name it is void, as varying from the form prescribed by the statute, which requires that it should be in the sheriff's own name.

10 Co. 100 b. [But the sheriff's power of taking a bond under this act upon an indictment found before himself at his tourn was taken away by 1 Ed. 4, c. 2, and upon indictments found in any other courts has been denied in a late case by all the judges except Eyre, C. J., *Bengough v. Rossiter*, 4 Term R. 505; 2 H. Bl. 418.] (b) If the sheriff takes bond in another's name to elude the statute, such bond is void. 2 Mod. 305.

But, where in debt on an obligation the defendant craved oyer of the condition, which was, that if another person (who was arrested at the suit of the plaintiff, and for whom the defendant was now bound) should give security, as the plaintiff should approve of, for the payment of 90*l.* to him, or should render his body to prison at the return of the writ, then the obligation to be void; this statute was pleaded, but adjudged not to be within the statute.

2 Mod. 304, 305, *Hall v. Carter*.

So, if a *capias* be taken out against the defendant, and a third person give the plaintiff a bond that the defendant shall pay the money, or render himself at the return of the writ, it is a good bond, and not within the statute, because it is not by the direction of the officer, but by the agreement of the plaintiff; and there is no law that makes the agreement of the (c) parties void; and if the bond was not taken by such agreement, it might have been traversed.

2 Jon. 95; 2 Mod. 305, cited. (c) The statute doth not extend to a bond given to the plaintiff himself. *Allen*, 58. Where the undertaking is given to the sheriff, the form directed by 23 H. 6, c. 9, must be strictly pursued, and therefore an agreement in writing to put in good bail for a person arrested on mesne process at the return of the writ, or surrender the body, or pay debt and costs made by a third person with the sheriff's officer, in consideration of his discharging the party arrested, is void. But where the undertaking is given to the plaintiff it is not within the statute; and therefore the undertaking of an attorney for the appearance of a defendant is not void, because it is given to the plaintiff in the action and not to the sheriff. *Rogers v. Reeves*, 1 Term R. 418.] [See 7 Term, 109, *Fuller v. Prest*.—An engagement of the defendant's attorney to the sheriff's officer, that he will give a bail-bond in due time, if defendant is discharged, is contrary to the statute and void. 4 East, 568, *Sedgworth v. Spicer*.]

Bond taken by the (d) serjeant at arms attending the House of Commons not within the statute, but being for ease and favour is void by the common law.

Hard. 464; *Keb*. 391. (d) Bond taken by the marshal of the Queen's Bench for the easement or delivery of a prisoner in execution, is void by the statute, although he be not named in the statute. *Cro. Eliz.* 66; 3 *Keb*. 71, S. P.—But a bond to the serjeant at arms attending upon the president and council of the marches of Wales is not within the statute. *Cro. Car.* 309, *Johns. v. Stratford*. *—* *Sed qu.* if not void by the common law, according to the case in the text?

If A be taken on a *capias ad satisfaciendum*, and escape, and be after retaken, and for his enlargement give a bond to the jailer, this is within the statute.

2 *Leon*. 119.

(O) His Duty on Arrests (*The Bail-Bond.*)

If a *capias* be awarded against B, and (a) before the arrest the sheriff take an obligation of him for his enlargement, this by special pleading may be avoided by force of the statute 23 H. 6, c. 9.

Noy, 43; Sid. 151, 456, S. P. seems *cont.* (a) So, if after the return. Sid. 301.

If the condition of a bond be to be a true prisoner, and (b) to pay so much by the week for chamber-rent, this is void by the statute; but Hale said that a bond for true imprisonment is good *primâ facie*, but that the defendant may (c) aver that it was also for ease and favour.

Vent. 237; Raym. 222, S. C. (b) If the sheriff adds to the condition, that the party shall be a true prisoner, that he shall pay for his meat and drink, this makes the obligation void. 10 Co. 100 b. (c) If the obligation be for the payment of money generally, yet the defendant may aver that it was for ease and favour, in the same manner as an obligor may in the case of simony or usury. Carth. 301; Hard. 464.

β A bond to indemnify the sheriff for not taking to prison the defendant in a *ca. sa.* is void, being a bond to indemnify against a contemplated escape.

Love v. Palmer, 7 Johns. 159.

But a bond to indemnify against already suffered, is good.

Given v. Driggs, 1 Caines, 450.

A bond that the obligor will remain a true and faithful prisoner, is good.

Dole v. Bull, 2 Johns. 239.g

If a sheriff take a bond for a point against law, and also for a due debt, the whole bond is void; for the letter of the statute of 23 H. 6, c. 9, is so; and a statute is a strict law; but the common law doth divide according to common reason, and having made that void which is against reason, and lets the rest stand.(d)

Hob. 14; Vent. 237; Carter, 229. ||(d) This distinction is recognised in *Newman v Newman*, 4 Maul. & S. 66; *Greenwood v. Bishop of London*, 5 Taunt. 727; but under a statute it seems the instrument may be good in part, and void in part, unless there be a clause declaring it void for all purposes. See *Doe v. Pitcher*, 6 Taunt. 369.]]

It is now (e) settled, that though the statute makes such bonds void, yet are they not *ipso facto* so, but must be avoided by special pleading.

Dyer, 116; Sid 22; 2 Saund. 154. (e) It was formerly held by Roll and Glin that it was a general law, of which the judges were to take notice *ex officio*, but since held otherwise. Lev. 86. [But see *contr.* 2 Term R. 569, *Samuel v. Evans*,] ||which settles that the act is a general law, and need not be especially pleaded; and in that case the court arrested the judgment after verdict for the plaintiff, in an action on the bail-bond, on *non est factum* pleaded, on the ground of the bond being void for being taken after the return of the writ; and this is also a ground of nonsuit, on *non est factum*. *Thomson v. Rock*, 4 Maul. & S. 336; and vide 3 Co. R. 243, note (C), (ed. 1826.))]

The defendant pleaded the statute of 23 H. 6, c. 9, and that he was attached and in custody, and that the bond was made for his enlargement, and so not his deed; whereupon the plaintiff demurred specially upon the conclusion of the plea, which ought to be, judgment *si actio, &c.*, and therefore the plea naught; and it was so agreed by the court.

Allen, 58, Leech v. Davys.

In pleading this statute, the defendant must recite it truly.

Cro. Eliz. 108, pl. 4; Sid. 351.

[A party grieved who recovers damages against the sheriff for not taking bail under this statute, is entitled to his costs: for before the statute, if the sheriff would not bail the party arrested, the latter had a remedy against him; and wherever a statute subsequent to the statute of Gloucester gives

(O) His Duty on Arrests.

a remedy, where damages were sustained before, there the party shall have his costs.

Cresswell v. Houghton, 6 Term Rep. 355.]

|| By 7 & 8 G. 4, c. 71, § 8, no sheriff, under-sheriff, &c., shall grant any warrant for the arrest of, or shall arrest the person of any defendant upon any writ or process issued by any plaintiff, in his own person, unless the same writ shall, at or before the time of granting such warrant, or of making such arrest, be delivered to such sheriff, under-sheriff, &c., by some attorney of one of the courts of record at Westminster, &c., or of the court out of which the writ shall have issued, or by the clerk of such attorney, or an agent authorized by such attorney in writing, and unless the writ shall be endorsed by such attorney, or his clerk, or such agent as aforesaid, in the presence of such sheriff, under-sheriff, &c., with the name and place of abode of such attorney.

See Tidd's Prac. 160, (9th ed.)

2. *Of his Duty and Liability in returning the Writ, and bringing in the Body.*

If there be no bail-bond, or the plaintiff be dissatisfied with the bail taken by the sheriff, it is usual to rule him to return the writ; and in the King's Bench, if the plaintiff is dissatisfied with the sheriff's bail, this is the only safe mode of proceeding: for if he takes an assignment of the bail-bond, he admits the sufficiency of the sheriff's bail; and if they are afterwards put in as bail above, he is precluded in that court (though not in the C. B.) from excepting to them. But a rule to return the writ cannot be had after the plaintiff has taken an assignment of the bond, if valid; for the sheriff is thereby discharged; but it is otherwise if the bond is void.

Tidd's Prac. 306, (8th ed.)

β An action lies against a sheriff for not returning an execution, or the plaintiff may proceed by attachment at his election.

Burk v. Campbell, 15 Johns. 456.

Where an execution had been delivered to a deputy, and twelve years afterwards on motion to the court an attachment was granted against the sheriff for not returning the execution.

Brockway v. Wilber, 5 Johns. 356.

But when the sheriff was brought up on this attachment, it appearing that the execution had been delivered to his deputy fourteen years before, and that the deputy was dead, he was discharged.

The People v. Gilleland, 7 Johns. 555.*g*

By the stat. 20 Geo. 2, c. 37, § 2, no sheriff shall be called upon to make a return of any writ or process, unless required to do so within six months after the expiration of his office: upon which statute it has been holden, that the months are lunar months, that the day of the sheriff's quitting office is to be reckoned as one, and that the sheriff cannot be ruled to return the writ after the expiration of six months, though *requested* before.

Doug. 463; 2 Term R. 1; 2 Saund. 47 m.

The rule to return the writ, being intended to bring the sheriff into contempt, must be personally served on the sheriff himself, or his under-sheriff, except in London, Middlesex, and Surry, where service on the deputy-secondary of the compters, sheriff's deputy, or under-sheriff's agent in town, is sufficient.

Tidd's Pract. 330; Dough. 420; 3 Term R. 351.

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In the K. B., where the rule expires in vacation, the sheriff need not return the writ till the first day of the ensuing term, and has the whole of that day to file the return; but in the C. B. it must be filed on the return, as the Common Pleas office is open in vacation.

5 East, 386; 1 Marsh. 270; 5 Taunt. 647.

If the sheriff does not return the writ according to the rule, it is contempt for which the court will grant an attachment, on proper affidavit of service of the rule; and this is the mode of proceeding against the late as well as the present sheriff; for, as to the former, he ought in strictness to have returned the writ before he was out of office, and therefore the contempt was committed while he was a servant of the court. But where the sheriff, on being ruled, gave notice that the writ was lost, and the defendant was in custody, the plaintiff should have proceeded as on a return of *cepi corpus*, and an attachment was held irregular.

Vide Tidd's Append. c. xiii. § 5, 6; Doug. 464; 1 Marsh. 289.

The writ should be returned on the day on which the rule expires, and the plaintiff may move for an attachment on the next day; or in K. B., if the rule expire on the last day of term, the plaintiff may move at the rising of the court on that day; and the rule for attachment is regular, though the sheriff, on a subsequent day in vacation, make his return before being served with a copy of the rule.

4 Term R. 496; and see 1 Price, 338; 1 Chit. R. 356 a; 11 East, 591.

The sheriff's return is either that defendant *non est inventus* in his bailiwick, or *cepi corpus*; and in the latter case, either *paratum habeo*, or that he is in his custody; or by way of excuse, that he is *languidus*, or *mortuus*, or *insane*,^(a) and not removable; or has escaped, or been rescued; or that he has discharged him from arrest under 43 Geo. 3, c. 46, § 2, on depositing in the sheriff's hands the sum endorsed on the writ, with 10*l.* to answer costs. If the sheriff returns *non est inventus* where he has or might have taken the defendant, he is liable to an action for a false return; and he may return *cepi corpus et paratum habeo*, though he has let the defendant go at large on bail.

Tidd's Pract. 331, (8th ed.,) Append. c. xiii. (a) 4 Barn. & A. 279; Tidd, *ubi sup.*

On the sheriff's return of *cepi corpus et paratum habeo*, if bail above be not duly put in, or if put in and excepted to they do not justify in due time, the plaintiff may either take an assignment of the bail-bond, or rule the sheriff to bring in the body. But where the sheriff has returned *cepi corpus*, and the plaintiff has recovered, in an action of escape, damages against the sheriff, he cannot rule him to bring in the body; for by the action he has treated the defendant as not in the sheriff's custody, and the rule treats him as being in such custody.

Tidd's Pract. 310, (8th ed.,) 2 Barn. & A. 623; 1 Chitt. R. 393, S. C.

The rule should be given without delay; for where the plaintiff took no proceeding till the third term after the return of *cepi corpus*, and in the mean time the bail became insolvent and the defendant absconded, the court set aside an attachment granted for not bringing in the body.

7 Term R. 452; 3 Bos. & P. 151; 9 East, 467.

The intent of the rule where the defendant is not in custody, is to compel the sheriff to put in and justify bail above; and it cannot be taken out till the time for justifying bail has expired: otherwise the sheriff might

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be fixed with the payment of the debt and costs, and upon his bringing an action against the defendant or his bail on the bond, they might have previously put in and perfected bail, and might plead *comperuit ad diem*. Where the time for putting in and perfecting bail has not expired, the rule for bringing in the body cannot be given till the day after the return of *cepi corpus*, and is irregular if given on the *same* day; but where the time for putting in bail has expired, the sheriff may be ruled to bring in the body on the same day that he returns *cepi corpus*.

Tidd's Pract. 311, (8th ed.); 2 East, 241; 4 Maul. & S. 427.

The sheriff must either bring in the body, or put in and perfect bail above within the time allowed by the rule, or the court will grant an attachment for the contempt. The contempt is not incurred till the day is past on which the rule expires; and an attachment cannot be moved for till the next day. In the K. B. the plaintiff may move for the attachment at any time after the expiration of the rule to bring in the body; and if it is *obtained* before the service of the rule for allowance of bail, the sheriff is fixed. But in the C. B. and Exchequer, though the rule to bring in the body has expired, yet if the defendant justify bail before the attachment is moved for, it is in time to prevent the attachment.

Tidd's Pract. 312, (8th ed.) β On the sheriff becoming fixed for not bringing in the body, the general rule is that he must pay the whole debt. *People v. Adgate*, 2 Cowen, 504.g

The attachment is a criminal process, directed to the coroner when it issues against the present sheriff, or, when against the late sheriff, to his successor. Until it be granted, the proceedings in the King's Bench are on the plea side of the court, and must be entitled with the names of the parties; but afterwards the proceedings are on the crown side, and the king must be named as prosecutor.

Tidd's Pract. 314, (8th ed.)

When the sheriff is fixed for a contempt, he is liable, in like manner as his bail on the bail-bond, to the payment of what is really due to the plaintiff, though beyond the sum sworn to, and costs, to the extent of the penalty of the bond; but he is not liable beyond it.

As we have seen, the sheriff is discharged by any unreasonable delay, so also a *cognovit*, or warrant of attorney for payment of debt and costs by instalments, discharges the sheriff. But where the plaintiff, at the desire of the sheriff's officer, forebore to enforce an attachment in the first instance, and two days afterwards applied to the sheriff for the debt and costs, the Court of C. B. held that the sheriff was not discharged.

1 Taunt. 159; 4 Taunt. 456. As to staying and setting aside proceedings against the sheriff, vide Tidd's Pract. 316, 317, (8th ed.) As to return to writs of execution, vide tit. *Execution*, vol. iii.; and as to Sheriff's fees, vide tit. *Fees*, vol. iv.

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WHEN a sheriff is sued for an act done by him in the execution of process, he has a right to take upon himself the conduct of the defence and to retain such attorney as he may think fit, although he has been indemnified by the party who had sued such process.

Peck v. Acker, 20 Wend. 606.

In an action on the case against a sheriff for a negligent and not a volun-

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tary escape, the measure of damages is the actual loss or injury sustained by the plaintiff.

Patterson v. Westervelt, 17 Wend. 543.

An officer is not liable to an action for not paying over money collected by him on execution, where he has been sued and a recovery had against him for selling the property, by the sale of which the money collected by him was made, when such recovery is equal to or exceeds the amount of the execution.

Newland v. Baker, 21 Wend. 264.

Assumpsit lies against a sheriff for money collected by him on an execution without a previous demand.

Crane v. Dygert, 1 Wend. 534; Armstrong v. Garron, 6 Cowen, 465.

An action lies against the sheriff for the amount of goods sold by him, though the purchaser to whom they are delivered refuses to pay for them.

Denton v. Livingston, 9 Johns. 96.

Trespass will lie against the sheriff for levying an execution after the return-day.

Vail v. Lewis, 4 Johns. 450.

Where a deputy-sheriff receives an execution which commands not his principal but the sheriff of another county to make the money for which the execution has been issued, the deputy may refuse to execute the writ; but if he proceed and collect the money under it, by that means becoming possessed of it under colour of his office, his principal is liable to the plaintiff for the money thus collected, in an action for money had and received.

Walden v. Davison, 15 Wend. 575. See Knowelton v. Bartlett, 1 Pick. 271; Marshall v. Hosmer, 4 Mass. 60; Bond v. Ward, 7 Mass. 123; Waterhouse v. Waite, 11 Mass. 207; Tobey v. Leonard, 15 Mass. 200.

The sheriff is liable for the neglect of his deputy to apply money received from sales of property attached, to the satisfaction of executions, though part of the property was sold at private sale, by agreement of the parties.

New Hampshire Bank v. Varnum, 1 Metc. 34.

In an action against a sheriff for an escape, it is no defence that the jail and jail-yard are defective and insufficient to keep the prisoners.

Green v. Hein, 2 Penn. R. 167; Smith v. Hart, 2 Bay, 395.

An action lies against the sheriff for an escape permitted by the jailer.

Duncan v. Klinefelter, 5 Watts, 141.

An action can be maintained against the sheriff for an escape, when he returned N. E. I. to a *ca. sa.* which had been delivered to him, and, prior to the return-day, his deputy had the defendant in custody under another *ca. sa.* and discharged him.

Wheeler v. Hambright, 9 Serg. & R. 390.

In debt for an escape from a *ca. sa.*, if they find for the plaintiff, the jury must find the whole debt and costs. (a) But if the action be in case, the jury may find such damages as they think proper. (b)

(a) Shewell v. Fell, 3 Yeates, 17; S. C. 4 Yeates, 47. (b) Duncan v. Klinefelter, 5 Watts, 141.

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The sheriff is liable, for all civil purposes, for the conduct of his deputy, whether he recognises and adopts his acts or not.

Hazard v. Israel, 1 Binn. 240. See Wilbur v. Strickland, 1 Rawle, 458.

A *distringas* will lie against a sheriff, while in office, to compel the sale of goods levied upon.

Lane's Executors v. Cowperthwaite, 2 Dall. 312.

Where the sheriff refuses to levy a *fieri facias* an action may be commenced against him and his sureties, before the return of the writ.

Shannon v. Commonwealth, 8 Serg. & R. 444.

The marshal of a court of the United States is liable to an action when he fails to obey the exigency of the writ, without a lawful excuse, or when he unlawfully violates the rights of others.

Life and Fire Insurance Company of New York v. Adams, 9 Peters, 573.

When by the sheriff's return of the execution it appears that he has levied the money, he is liable to an action without a previous demand.

Dawson v. Shaver, 1 Blackf. 204.

At common law, an action lies against a sheriff or constable for neglect of duty in executing and returning an execution.

White v. Wilcocks, 1 Conn. 347.

In an action against an officer for neglect of duty on mesne process, the rule as to damages is the amount of injury sustained, and not the amount of the debt.

Clark v. Smith, 9 Conn. 379; Clark v. Wright, 5 Mart. Rep. N. S. 125; Shuler v. Garrison, 5 W. & S. 455.

If a sheriff wrongfully execute the process of a court, he may be sued in a different court for the damages consequent on his act.

Clarke's Executors v. Morgan, 4 Mart. Lo. R. 79.

An action lies against a sheriff to recover damages so far as his negligence, or want of skill, in the execution of his official duties cause a direct injury, but not for losses remotely consequential, and such as grow out of a failure of gain.

Lambeth v. Mayor, 6 Lo. Rep. 737.g

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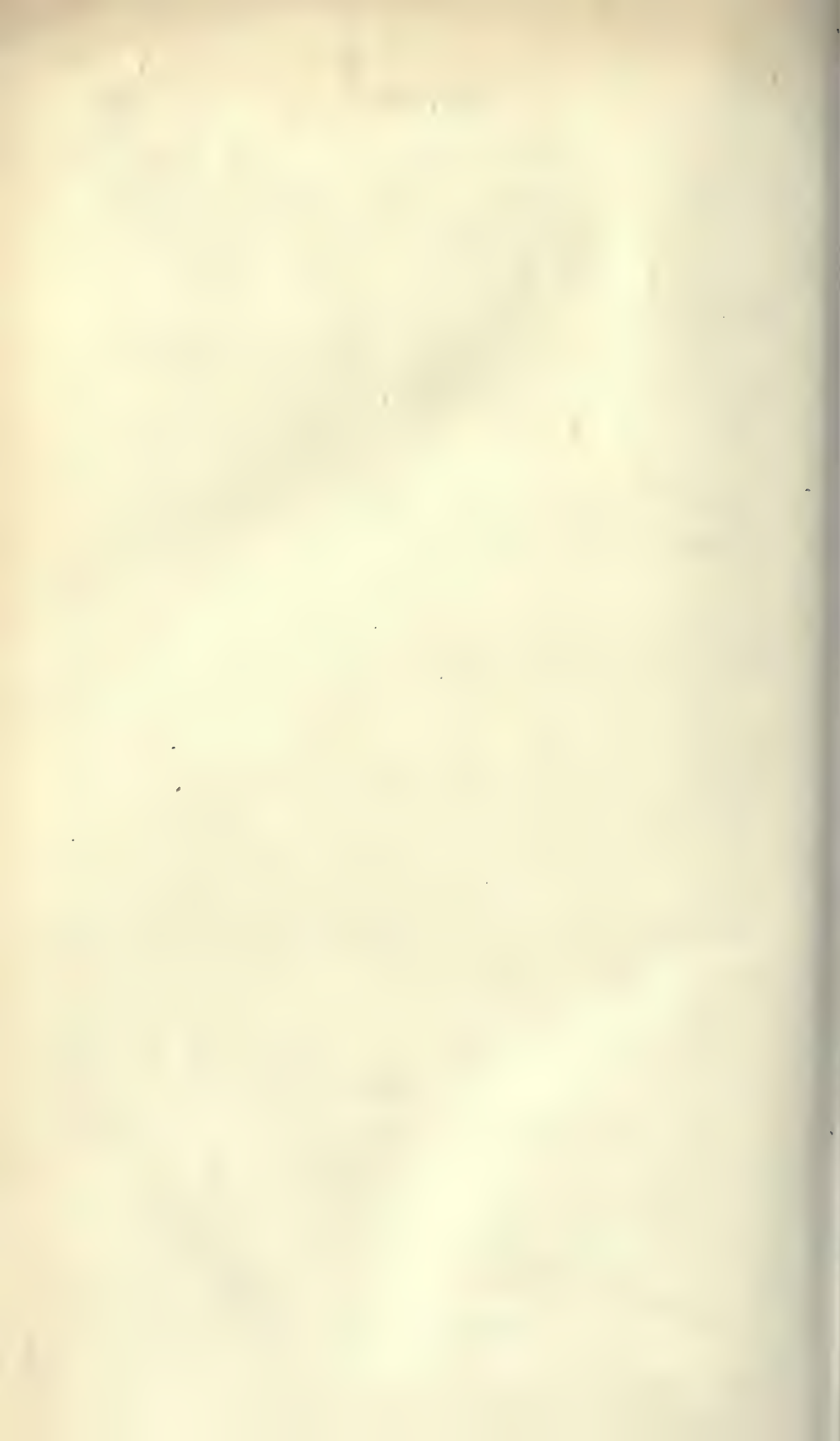
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